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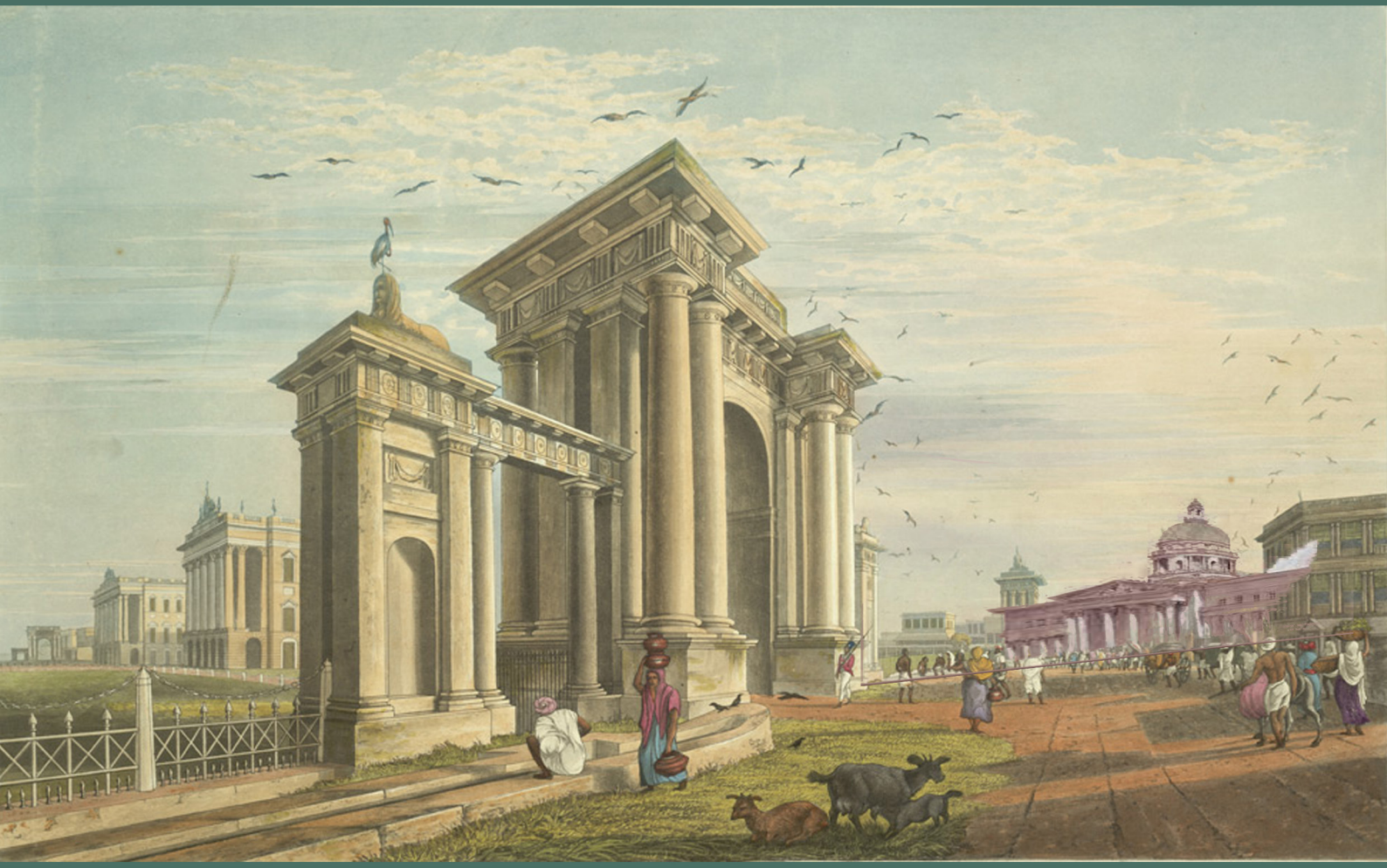

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A Refereed Journal

Edited by: Prof. Manik Sinha

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HUMAN RIGHTS FOR SOCIAL JUSTICE THROUGH HUMAN RIGHTS AUDIT WITH REFERENCE TO HUMAN RIGHTS ACT 1993 : An Analysis

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ABSTRACT

This paper seeks to study the role of District judiciary for the protection of human rights in order to achieve social justice, despite various barriers and limitations. Can law alone protect the human rights of the commons? Even the educated mass are not in a position to protect their human rights. The women and children are easy victim of human rights violation. The protectors of human rights are the great violators. In this respect, if there is introduction of HUMAN RIGHTS AUDIT by CAG like constitutional body, the menaces of human rights violation can be gradually checked. The fact is that the human rights are violated in successive hierarchy .There is requirement of checks on MATSYA NYAYA through human rights audit. The paper seeks to study the grass root reality of human rights violation in India in historical perspective and reliability on present mechanism.

Key Words : Human Rights, Social Justice, DPSP, Due Process of Law, Human Rights Audit.

PAGE : 8 REFERENCES : 21

INTRODUCTION

Human Rights and Social Justice are the two terms which has emerged as two ANTIBIOTICS of individual and social ills. Fortunately these two terms have equally two words each. Human Rights – Human and Rights, constitute the very foundation of the existence of the human being and the society. The Human Rights are inalienable fundamental rights. The protection of Human rights is sine qua non for the peaceful existence of individual and social justice. Social justice is justice to the large number of people. If individual's human rights are not protected the rights of the large number of the people will surely be affected. Hence their peaceful existence will be endangered. This is the reason that the fundamental Rights and

directive principles of the state's policy together are taken as Human rights. The Human Rights Act 1993, also defines as the right to life, liberty, equality and dignity of individual guaranteed by the constitution or embodied in the international covenants and enforceable by courts in India. Thus it is evident that the courts have a major role to play in enforcing the rights. But the courts can protect legal rights. Whereas all Human Rights are not legal rights as on date. More so it is not possible to codify all probable laws in anticipation for the protection of the human rights in furtherance of social justice. In this situation the due process of law and principle of natural justice play vital role in the protection of the Human rights. Speedy trial, free legal aid, the law of arrest, arbitrary interference with privacy, custodial torture, sexual harassment and right to work with human dignity, etc. are a number of judgments through which the human rights of the people have been protected. But it does not mean that the District judiciary has no role to play. Section 30 of the Human Rights Act 1993, enables the State government to specify District & Session courts as Human Rights Court. This reflects the significance of the district judiciary to provide protection at grass root level. But nowhere has it been mentioned as to which type of cases will be covered in the district court. More so the district and session courts are overburdened .There is lack of adequate number of judges as per the population rate. The National Human Rights Commission and the state Human rights commission has been constituted as per the protection of Human rights Act 1993.But there is no mechanism for the appeal from state human rights commission to national human rights commission. Despite various legal provisions, the human rights of the people has been violated in India.

The world witnessed two devastating world wars which followed the formation of United Nations (U.N.O.) for the establishment of peace, guarantee of freedom from the clutches of feudal lords and economic opportunities for prosperity. The U.N.O. declared the policy in the name of Universal Declaration of Human Rights(UDHR) in 1948[1] for the welfare of all beings especially human beings on this earth despite any caste, religion, race, geographical areas, place of birth, gender etc. The Universal declaration of human rights became a policy slogan for UN members in order to bring the heaven on earth. India got independence in 1947 and framed her constitution incorporating fundamental rights as civil rights for liberty and directive principles of state policy(DPSP) for the states to bring socio economic justice under chapter III & IV of the constitution. There is nowhere in the Indian constitution written as the term Human Rights and explained. Thus. The term human rights signifies a decent life with all facilities. Life without threat&terror, a life with all dignity in society. It corresponds to life under Article 21 of the constitution ii. Thus human rights has become a touch stone from all cure of the ills of life as the fundamental rights & socio economic justice- the trio are the "Policy Rights" for the protection of human rights[2] . The human rights means the rights relating to liberty, equality[3] and dignity[4] of individual

1. Article 1 of UDHR: All human beings are born free and equal in dignity and rights. Everyone.
2. Everywhere is considered to be holder of the rights solemnly proclaimed on 10th December 1948.
3. Sec 2(d) of the protection of human rights act 1993.
4. Article 14 deals with equality before law and equal protection of law as a cornerstone of human rights

guaranteed by the constitution embodied in the International Covenants[5] and enforceable by courts in India. The International Covenants means the international covenant on civil and political rights and political rights and the International Covenant on Economic, Social and cultural rights adopted by the General Assembly of the United Nations on the 16th December 1966. Despite the efforts made by the government a special recognition had to be given by the parliament by enacting a legislation as "Protection of Human Rights Act 1993 and provisions for the establishment of "human rights courts[6] ". The act provides that the state government with concurrence of Chief Justice of the High Court specify for the each district a court of session to be a human rights court to try the offences arising out of the violation of human rights. Although the proviso in the nature of explanation states that nothing in this section shall apply if a court of session is already specified as q special court or (b) a special court is already constituted for such offences, under any other law for the time being in force. But nowhere in the Act specifies as to which offences can be tried under the Act and Human Rights Court. The act also deals with human rights commission in the centre. Here also the commissions have been assigned functions to protect the human rights with a power of civil court under C.P.C. 1908 whereas the subject matter are offences as mentioned under section 30 of the Act[7] . There is no authority to the commission as session courts/ criminal courts, nor can the aggrieved move to the National Commission as appellate tribunal. Thus, the concept under the Act remains utopian. As one has to move to the High Court under Writ jurisdiction or Supreme Court if there is a violation of fundamental rights under Article 14 to 32 of the Constitution. In this way it seems that despite the legal provisions and mechanisms available, the Act seems to search its own "jurisdiction" and procedure for the protection of human Rights of the commons. In this context, the researcher tries to understand the basic meaning of human rights through different issues related to "human life "whether mere legislative provision can settle issues related to human rights violations? How the human right of subordinate can be protected against the superior/boss? Why not the state human rights commission as well as National Human Rights Commission works as a 'human rights watch' and assigned the task of CAG (Comptroller and Auditor General of India) like to the Human Rights Commissions for the 'Human Rights Audit' with the help of thirdeye. Under the Act, whose human rights are proposed to be protected? What about human rights of the vulnerable sections of the society: i.e. women, children, weaker sections, Dalits, economically weaker as well as the person without confidence and isolated one.

HMAN RIGHTS ISSUES

Before 1945, there was kingship almost all over the world and most of the countries were colonies of the British, Portuguese (European) powers. They were not the preservers of human rights rather, they had own vested economic interest in their colonies. Therefore "welfare" was a "concept of far cry". With the advent of United Nations which followed the freedom of colonies and recognition of Hu-

5. Right to life under article 21 right to dignity also.
6. Sec. Internationalcovenants of civil and political rights; andcovenants on economic, social and cultural rights.
7. Sec 2(e) of the protection of the human rights act defines human rights court as specified under section 30 of the act.

man Rights as a bundle of rights with the declaration of UDHR in 1948. Although, Indian Constitution did not made in the constitution a separate provision. It enshrined the concept under chapter III and chapter IV of the Constitution. Therefore the question arises whether Human Rights is a mere vague concept? How can we reach at a point that certain issues are human rights "issues", can be understood under the different generations of human rights of course the first generation of Human Rights. Of course, the first generation of Human Rights like under Article 19(1) (a) of the constitution explaining as freedom of speech and expression. As Baba Saheb has declared in the constituent Assembly debate that "if all rights are given but one is asked to remain silent/ not to speak, his/her entire rights will vanish gradually. On the other hand, if he is given freedom of speech and expression he will avail all his rights gradually. Thus Article 19 (1) (a) is the source to all human rights under the chapter III in the form of writ and DPSP under chapter IV in the form of demand during election. Thus human rights cannot assigned or allotted rather it can be demanded. Liberal rights alone do not ensure the development of personality of individual.The right to life and physical integrity is the core of human rights. In this concern protection of woman from sexual harassment, eradication of forced Labour,Slavery and human trafficking combating sexual harassment at workplace. , right to food, right to education, etc. .

The 1st and second generation of human rights are related to basic substance of life, liberty, property and dignity, but the third generation of human rights talks about right to development, right to peace and right to clean environment. It is also connected with right to sustainable development. The fourth generation talks about democratic socialism[8], good governance and human security .for decades the concept of security was understood only in military sense[9] . After a decade, the UNDP took up the idea and reported in 1993, human development report. Starting out with economic security; access to food, health security access to healthcare and protection from disease; environmental security- protection from pollution, personal security, i.e. that is physical protection against torture ,war and criminal attacks ; community security, survival of traditional culture, political security , i.e. freedom from political oppression [10]. Now in 21st century, the national bodies have lost into `global village'. Hence, under globalization, the shadow of terrorism is a great threat to human rights. It has an attack on radical reform, economic progress, emancipation efforts from rigid customs. Hence it can be said that human rights has lost nothing of its original impetus. But human rights alone do not ensure effective enjoyment of human rights. Thus Human rights cannot be seen in isolation.

HUMAN RIGHTS COMMISSIONS

Following the world wide change after the declaration of universal human rights by UDHR in 1948, and constitution of universal human rights watch, the govt. of India also legislated the "the protection of hu-

8. Christian Tomaschat, human rights , 2nd edition, oxford university press,p.52.
9. Democratic socialism endeavors to end poverty.
10. The concept of human security (people's security) appeared in independent commission on disarmament and security issue (Palmecommission), 1982: commonsecurity: a blueprint for survival New York, 1982.

man rights act 1993 [11] " .the Act constitutes national human rights commission, states human rights commission in states and human rights court for better protection of human rights. The human rights commission is empowered to enquire[12] into complaints of violation of human rights of abetment there of , negligence in the prosecution of such violation by a civil servants the commission may move suo motto also. The NHRC can interfere in any proceeding involving any allegation of violation of human rights .Pending before a court with the approval of court. It can visit any jail and study living condition of inmates and can make recommendations thereon. It can undertake research in human rights. It can promote human rights literacy and awareness for the protection of these rights. The commission shall not entertain in regard to events which happened more than 1 year before the making of the complaints [13] but it can entertain the complaints if the matter is referred for investigation by the Supreme Court[14]. The commission while making enquiries into the complaint shall have all the powers of the civil court [15]. After the enquiry the commission may recommend to the concerned government or the authority to initiate proceedings for the prosecution against the concerned person[16] . The commission may approach to the Supreme Court or the High court concerned for such directions, orders or writs on the commission may consider necessary. It can also recommend for immediate interim relief. It has a power to entertain the complaints n against the armed forces violating Human Rights[17]. Since India is a federal state, therefore each state has its own Human Right Commission . The state commission can enquire into the Human Rights violation with regard to the matter enumerated in the list IInd and list IIIrd of the 7th schedule of the Constitution. The Human Rights commission[18] is a recomendary body, nevertheless it is very significant in the present day delay in justice by the court due to various reasons which is itself a violation of human rights. But the composition of NHRC is very small as compared to the responsibilities assigned. Likewise the composition of state Human Rights Commission is thinner, i.e., including the chairperson. The act also provided establishment of the Human Rights Courts for the speedy trial of the offences arising out of the violation of Human Rights. The state government may specify for each district a court of sessions to be a Human Rights court to try such offences. It shall be done with the concurrence of the Chief Justice by notification.

HUMAN RIGHTS COURT

The Protection of Human Rights Act, 1993 provides for establishment Human Rights Courts for the purpose of providing speedy trial of offences arising out of violation of human rights. It provides that the state Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each dis-

11. Human development report(1994),22.along with human development report (1991), 36.
12. The act came through ordinance dated 28th September 1993. It was subsequently converted into Act, known as the protection of human rights Act,1993.
13. Section 12 of the protection of human rights act 1993.
14. Sec. 36 (2) of the act 1993.
15. ParamjitKaurvs. state of Punjab, air 1999, sc. 340
16. sec. 13 of the act 1993.
17. Sec. 18 of the act 1993.
18. Sec. 19 of the act 1993.

trict a Court of Sessions to be a Human Rights Court to try the said offences. The object of establishment of such Courts at district level is to ensure speedy disposal of cases relating to offences arising out of violation of human rights. The Act refers to the offences arising out of violations of human rights but it does not define or explain the meaning of "offences arising out of violations of human rights". The Act does not give any clarification as to what type of offences actually are to be tried by the Human Rights Courts. No efforts has been made by the Central Government in this direction. Unless the offence is not defined the courts cannot take cognizance of the offences and try them. Till then the Human Rights Courts will remain only for namesake. Even if "offences arising out of violations of human rights" are defined and clarified or classified, another problem arises in the working of the Human Rights courts in India. The problem is who can take cognizance of the offences. What the Act says is in each district, one Sessions Court has to be specified for trying "offences arising out of human rights violation". It is silent about taking of cognizance of the offence. The Prevention of Corruption Act, 1988 is another law, which provides for appointment of a Sessions Judge in each district as Special Judge to try the offence under the said Act. Provision has been made in section 5 of the Prevention of Corruption Act, 1988 empowering the Special Judge to take cognizance of the offences under the said Act. In the Protection of Human Rights Act, 1993 it is not so.Thus Sessions Court of the district concerned is considered as the Human Rights Court. Under the Criminal Procedure Code, 1973 a Sessions Judge cannot take cognizance of the offence. He can only try the cases committed to him by the magistrate under Section 193 of the Cr.P.C. Similar problem had arisen in working of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 in the beginning. The Special Judges used to take cognizance of the offences. In **Potluri Purna Chandra Prabhakara Rao V. State of A.P**., 2002(1) Criminal Court cases 150; **Ujjagar singh & others V. State of Haryana & another,** 2003(1) Criminal Court Cases 406 ;and some other cases it was held that the Special Court (Court of Session) does not get jurisdiction to try the offence under the Act without committal by the Magistrate. The Supreme Court also held same view in **Moly & another V. State of Kerala,** 2004(2) Criminal Court Cases 514. Consequently the trial of all the cases under the Prevention of Atrocities Act were stopped and all the cases were sent to the Courts of jurisdictional Magistrates. Thereafter the respective Magistrates took cognizance of the cases and committed them to the Special Courts. The Special Courts started trying the cases after they were committed to them. The Act was later amended giving the Special Courts the power to take cognizance of the offences under Act. The situation in respect of the Human Rights courts under the Protection of Human Rights Act, 1993 is not different. Apart from the above, the Special Courts will face yet another question whether provisions of Section 197 of Cr.P.C. are applicable for taking cognizance of the offences under the Protection of Human Rights Act, 1993. In most of the cases of violation of human rights it is the police and other public officers who will be accused. The offence relate to commission or omission of the public servants in discharge of their duties. Definitely the accused facing the trial under the Act raise the objection. There are plethora of precedents in favour of dispensing with the applicability of Section 197 of Cr.P.C. on the ground that such acts do not come within the purview of the duties of public servants. But there is scope for speculation as long as there

is no specific provision in the Act dispensing with the applicability of Section 197 of Cr.P.C. The object of establishment of such Courts at district level is to ensure speedy disposal of cases relating to offences arising out of violation of human rights. Unless the lawmakers take note of the above anomalies and remove them by proper amendments the aim for which provisions are made for establishment of special courts will not be achieved.[19]

HUMAN RIGHTS AUDIT

In 2010, Barrick Gold Corporation began efforts to launch a standalone human rights compliance program. Operating ethically and respecting the stakeholders are fundamental premises of business. The human rights compliance program grounded primarily in ensuring that the key corporate values be followedin all operating locations and at all times. In its execution, the program strived at all times to adhere to relevant best practices for compliance programs.with a substantive foundation of human rights norms. The human rights program also attempted to maximize efficiencies with other company compliance programs and activities wherever possible, enabling a coherent company approach composed of a culture of compliance, clear human rights guidelines and requirements, and effective global operationalization with the UN Guiding Principles on Business and Human Rights.[20]

Nestlé, the Indian global company operates with a fundamental respect for the rights of the people employed in the company, do business and interact with along value chain. It maintainshigh standards across the company. It makes the employees more effective in their approach to compliance, i.e. fight against child Labour and corruption while ensuring that human rights – such as workers' freedom of association, local communities' access to water or consumer privacy – are respected. The Nestle Human Rights Due Diligence (HRDD) Programme strives for continuous improvement in this area. [21]

On this pattern, the human rights watch and Human Rights Audit can be done under the control and guidance of the States Human Rights Commission and the report can be analyzed by the National Human Rights Commission. According to the report the courts can be directed to take action against the violators of the Human rights. All the organization compulsorily should constitute Human rights Due Diligence Cell and 'Annual audit' of the organization be done with the help of RETIRED JUDGES AND IMMINENT PERSONS OF THE SOCIETY. This regular phenomena will secure and protect the human rights of all the people in the country. The FINAL REPORT CAN BE SUBMITTED before the stake holders as SOCIAL AUDIT OF MNREGA.The media can play pro-active role in this regards.

CONCLUSION

The constitution of human right commission is a revolutionary step in the last phase of 20th century within four decades of universal declaration of human rights. The Act 1993 has tried to incorporate the international covenants – civil and political rights and economic, social and cultural rights. With the increasing pace of population,industrialization, urbaniza-

19. Sec.21 to 29 of the act 1993, deals with the establishment, powers and functions of the human rights commission in states in India.
20. N.Chandrashekharayya, Advocate, Raichur. www.barrick.com
21. www.nestle.com/csv/human-rights-compliance/human-rights

tion, the inhuman activities have also increased. It has created pressure on the courts which depends on the witnesses and documental evidences. Thus, delay is inevitable along with injustice. Thus, amidst dismay, the Human Rights commission is a 'light house'. But the Human Right Act 1993 does not explain specifically what human rights are as well as which offence will be called as human rights violation. The constitution also does not specifically deals with the human rights violation. The Constitution also does not specifically deals with the human rights-specifically anywhere. In this scenario the constitution of human rights court as special court in the District court is also confusing. Herein, the state commissions requires to strengthen in the capacity and its units requires to extend to all the districts with the establishment of 'Human Right Court'. Here the units of state Human rights Commission shall function as investigation agency which will speed up the function of the human right court and speedy decision will be possible. More so the commission should take preventive and curative measures too. The commission should take up grass root remedial measures through the help of NGOs in human rights which can move from house to house looking into the family for the protection of human rights of children along with family, training to the children, parents and community can check human right violation immediately. This effort will reduce the domestic violence, juvenile delinquency, children in conflict with law. The NGO's can function under the mentorship and control of human right commission. In the long run, the criminal offences will decrease and the time of people and society will be invested in constructive work. Secondary, the human rights can start 'Human Rights Audit' in private as well as public sector compulsorily as there is provision of financial audit. Since in the organization, the peers, boss, supervisors, H.O.D, administrative officers are the chief violators of human rights. Therefore, The HR- audit will create a fear psychosis among the violators and the news of violation will decrease. Thus, the corruption in system may go down also. In this way it can be said that Human Rights are rights to be human and to remain human. At present the Human Right Commission are active for 'post event cognizance'. If the commission starts reformatory policy from children and family level through N.G.O by providing training in "human rights" to weaker sections and "human duties" to the stronger section of the counterpart, the human rights violation rate will decrease. At present we only talk about rights and almost never talk about duties enshrined under article 51(a) of the constitution. Moreso, the teaching and training to the children regarding human rights as well as human duties will strengthen the social system. As the violators of human rights are not the government machinery always. It is the private body/individual who is strong as well as dominant violates the human rights of the weaker. Hence the sense of respect can be created from the early age in order to protect the human right of others. In this connection, the human rights of the students can be protected during the beginning of the session. The ragging like inhuman events can be eradicated. The corruption in the system by violation of Article 14, 15, 16, 19 and Article 21 of the constitution can be effectively checked.

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CYBER CRIMES IN INDIA

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ABSTRACT

Cyber crime is a global problem today that affects computer users and in all developed and developing countries that rely on computing and communication technologies. In the cyber space there is a net of websites and they are busy day and night in disseminating useful information but it has generated some problems also. A number of frauds are committed at website. People are cheated by the misuse of information technologies and the security of electronic record is also at stake. Law violators always like to go one step ahead from law makers. Indeed the cyber criminal have put a challenge to all scientists and law makers for the control of cyber crimes rampant all over the globe.

Cyber Crime in broader sense means : Any illegal behaviour committed by means of or in relation to a computer system or network including such crimes as illegal possession and offering or distributing information by means of a computer system or network. Cyber crimes refers to activities like credit card fraud, unauthorised access to computer system, hacking, child pornography, software piracy cyber stalking etc. Electronic commerce includes encryption and data security. Defamation and obscenity issues and censorship are some of the various aspects which limits to a great extent, the freedom of expression, intellectual property rights over copy right software licensing and trademark protection. Jurisdiction focuses on who can make and enforce the rules governing cyber space. Privacy right addresses data protection and privacy on the internet.

KeyWords: Cyber law, Cyber crime, Illegal Possession, Privacy Right, Information Technology Act,

PAGE : 10 REFERENCES : 14

INTRODUCTION

Cyber crimes are far more different from the conventional crimes. They are characterized by high technological innova-

The paper was presented at 39th All India Criminology Conference from 22 – 24th September 2016 organised by National Law University, Odisha, Cuttack.

tion, anonymity, distance from the scene of crime, extent of its reach and most important, the usual profile of the criminal, many times a juvenile[1] in the words of Mittal & Mittal.

"Computer crimes and crimes committed through the Internet is particular are extremely challenging because of their sophistication and variance from crime in the ordinary sense[2]. Internet is one of the fastest modes of communication and has spread its sphere, covering all possible shades of mankind. But as the saying goes, "every good side has a bad side too". The same is true with the computers and the Internet technology too. The advent of computer has been a boon to students, lawyers, businessmen, teachers, doctors, researchers and also to the criminals. Today we venture into the virtual world of cyber space where our privacy does not exist at all. What you share, in good faith, can be exploited against you.[3] Crimes are no more confined to the physical space alone but have entered into the virtual cyberspace. Cyber crime in a criminal activity in which computers or computer networks are used as a tool, a target, or a place of criminal activity and includes everything from electronic cracking to denial of service attacks.

CYBER LAW AND CYBER CRIME

Cyber crime is a narrow sense means : Any illegal behaviour directed by means of electronic operations that targets the sensitivity of computer systems and the data processed by them.[4]

Cyber crime is a broader sense means: Any illegal behaviour committed by means of or in relation to, a computer system or network, including such crimes as illegal possession (and) offering or distributing information by means of a computer system or network.

Cyber law means governing cyber space. Cyber law and cyber space signifies everything related to computers, software, data storage devices, Internet, websites etc. It also includes electronic devices, such as ATM Machines, mobile phones.

INFORMATION TECHNOLOGY ACT, 2000

The preamble of the Information Technology Act, 2000, an act to provide legal recognition for transaction carried out by means of electronic communication, commonly referred to as electronic commerce, which involves the use of alternatives to paper based methods of communication and storage of information, to facilitate electronic filing of documents with Government Agencies.

The aims and objectives of the Act are as follows :
(a) A facilitating Act,
(b) An enabling Act,
(c) A regulating Act protection of some cyber crime under I.T. Act,. 2000
Types of cyber crime and its protection under the Act, 2000.

CYBER PORNOGRAPHY

It is very difficult to generate a common definition of pornography because what is pornography or obscenity in India may

1. Mittal SK & Mittal Roman, 2004, "Legal Dimensions of Cyber Space" ILI, New Delhi P.261
2. 1 bid, P.260
3. Sharma Vakul 2002 "Handbook of Cyber Law". Macmillan India Ltd. P.126
4. Available at : http//www.cyberlawclinic.org/cyber crime htm

not be in US. As pornographic videos, pictures and stories are easily available and accessible on Internet, there have been may attempt to limit the availability of pornographic content on the internet by the Governments and laid enforcement bodies throughout the World. In India, Indian Penal Code also deals with pornography. The Constitution of India declares law against obscenity as constitutional. Section 67 says that[5] whoever publishes or transmits or causes to be published in the electronic form, any material, which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodies in it, shall be punished on first conviction with imprisonment of either description for a term, which may extend to five years and with fine, which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine, which may extend to two lakhs rupees.

UNAUTHORISED ACCESS

Section 43(a)[6] deals with unauthorized access. It says that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network, accesses or secures accesses to such computer, computer system or computer network, he shall be liable to pay damage by way of compensation not exceeding one crore rupees to the person so affected.

Section 66 says that[7]

1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits computer related offences.

2) Whoever commits computer related offences shall be punished with imprisonment upto 3 years or with fine which may extend upto two lakhs rupees or with both.

ASSISTING UNAUTHORISED ACCESS

Section 43(d)[8] deals with damages or causes which damages any computer, computer system or computer network, data, computer database or any other programmes in such computer, computer system or computer network, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

COMPUTER FRAUD

Computer fraud section 43(h)[9] says that the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system or computer network, shall be liable to pay compensation.

CRIME RELATED TO DIGITAL SIGNATURE

Section 71 says thae[10] whoever makes

5. Sec.67 of I.T. Act, 2000
6. Sec.43(a) of I.T. Act, 2000
7. Sec.66 of I.T. Act, 2000
8. Sec.43(d) of I.T. Act, 2000
9. Sec.43(h) of I.T. Act, 2000
10. Sec.70 of I.T. Act, 2000

any misrepreseptation to or suppresses any material fact from the controller or the certifying Authority for obtaining any license or Digital Signature Certificate, as the case may be, shall be punished with imprisonment for a term, which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

NON-COMPLIANCE WITH CONTROLLER'S ORDER

Section 68[11]

1) The controller may by order, direct a certifying Authority or any employee of such Authority to take such measures or cease carrying on such activities as specified in the order if those are necessary to ensure compliance with the provisions of this Act, rules or any regulations made there under :

2) Any person who fails to comply with any order under sub section (1) shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding two lakh rupees or to both.

INVESTIGATIONS & SEARCH PROCEDURES[12]

Section 75 of Information Technology Act, 2000 takes care of jurisdictional aspect of Cyber Crimes and one would be punished irrespective of his nationality and place of commission of offence. Power and investigation has been given to police officer not below the rank of Deputy Superintendent of Police or any officer the Central Government. He may enter any public place, conduct a search and arrest without warrant person, who is reasonably expected to have committed an offence or about to commit computer related crime. Accused has to be produced before Magistrate within 24 hours of arrest. Provisions of Criminal Procedure Code, 1973 regulate the procedure of entry, search and arrest of the accused.

ANALYSIS OF THE I.T. ACT OF 2008[13]

The salient features of the Amendment Act are as follows :

1) It has created liability of anybody corporate towards dealing with Sensitive Person Data[14]

2) Introduction of virus, manipulating accounts, denial of services etc. made heavily punishable[15]

3) Sending a threatening, irritating messages and also sending misleading information about the origin of the message electronically has been made punishable[16]

4) The acts of fraudulently receiving and retaining any stolen computer resource or communication device have also been made punishable[17]

5) Dishonest use of somebody else's digital signature has been made punishable[18]

6) Cheating using computer resource has been made punishable[19]

7) Introduced the special provisions dealing with Cyber Terrorism[20] which include following criminal activities :

11. Sec.68 of I.T. Act, 2000
12. Available at : http://www.legalserviceindia.com/article/1146 cyber crime and law html
13. I.T. Act amendment 2008 came into force after in February 2009 after the assent of the President
14. Amendment of Sec.43 of I.T. Act, 2000
15. Amendment of Sec.66 of I.T. Act, 2000
16. Sec.66A, Phishing & Span
17. Insertion of new section 66B
18. Insertion of new section 66C
19. Insertion of new section 66D
20. Insertion of new section 66F

(a) Denial of service of resources in use by nation.
(b) Attempting to penetrate or access as a computer resource without authorization or exceeding authorized access has been made punishable.
(c) Introducing or causing to introduce any computer containment likely to cause death or injuries to person or damage to or destruction of property or disruption of supplies or services essential to the life of community or
(d) Knowing or intentionally penetrates or accesses a computer resource without authorization or exceeding authorized access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons for the security of the State or foreign relations or any restricted information, data or computer database, with reason to believe that such information, data or computer database so obtained may be used cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence or to the advantage of any foreign nation, group of individuals or otherwise commits the offence of cyber terrorism.

INFORMATION TECHNOLOGY ACT & INDIA PENAL CODE

All cyber crimes do not come under the I. T. Act. Many cyber crimes come under Indian Penal Code.
For example

Sending threatening message by e-mail	Sec.506 IPC
Sending defamatory message by e-mail	Sec.499 IPC
Forgery of electronic records	Sec.465 IPC
Bogus websites, cyber frauds	Sec.420 IPC
E-mail spoofing	Sec.465, 419 IPC
Web — jacking	Sec.383 IPC
Online sale of narcotics	N D PS Act
Online sale of weapons	Arms Act
Hacking	Sec.66 I.T. Act
Pornography	Sec.67 I.T. Act
E-mail bombing	Sec.66 I.T. Act
Denial of service attacks	Sec.43 I.T. Act
Virus attacks	Sec.66 I.T. Act
Logic Bombs	Sec.66 I.T. Act

CYRER CRIME AND THE IMPACT OF CRIMINAL JUSTICE SYSTEM IN INDIA

Cyber crime has made a significant impact on the criminal criminal justice prevalent throughout the World. The effects are seen even more as nations are constantly trying to provide faster and well-organized services to other citizens with the help of cyber space via internet. Almost all crimes in the modern time involve the use of computers and other electronic media at some stage of the act being committed by the offenders. Realizing the effectiveness of computers and the Internet to succeed in committing conventional crimes the criminals are using them as tools for committing such criminal offences, Some of the conventional crimes where cyber space and other electronic media have been used are : Organised Crime, Terrorism & Cyber Crime.

HOW EFFICIENT IS INFORMATION ACT, 2000

It cannot be disputed that I.T. Act, 2000 though provides certain kinds of protection, yet does not cover all the spheres of the I.T. where the protection must be provided. Copy right and trademark violations do occur on the Net, but copy rights Act, 1976 or Trademark Act, 1994, are sali-

ent on that which specifically deals with the issue. Therefore, have no enforcement machinery to ensure the protection of domain names on the Net. Transmission of e-cash and transactions online are not given protection under Negotiable Act, 1881. Online privacy is not protected, only Section 43 (Penalty of damage to Computer or Computer system) and 72 (Breach of Confidentially or privacy) talks about to in some extent, but does not hinder the violations caused in the cyberspace.

Internet Service Providers (ISP) who transmits some third party information without human intervention, is not made liable under the I.T Act, 2000. One can easily take shelter under the exemption clause, if he proves that it was committed without his knowledge or he exercised due diligence to prevent the offence. It is hard to prove the commission of offence as the terms "due diligence" and "lack of knowledge" have not been defined anywhere in the Act. And, unfortunately, the act does not mention how the extra-territoriality would be enforced. This aspect is completely ignored by the Act. Where it had come into existence to look into cyber crime, which is on the face of it an international problem with no territorial boundaries[21]

CYBER CRIME AND THE INTERNATIONAL CO-OPERATION

An International co-operation in fighting the menace of Cyber Crime is the need of the hour today as the Cyber Crime knows no boundaries. There is a need to create awareness among the international community. Sec 75 of the I.T. Act clearly lays down that its provisions shall apply to "any offence or contravention committed outside India by any person, irrespective of his nationality", provided that such act involves a computer system or computer network located in India. But the biggest problem in securing international cooperation is that some nations are trying to protect their own citizens once blame comes on them.

PREVENTION & CONTROL OF CYBER CRIME

Following are the steps which may be initiated by various individuals organized and other agencies to prevent and/or control cyber crimes.

In case of organization :

(a) The first step must be to begin the process of fully understanding the organization's exposure to the threat of data/ information. For instance, at the time of recruitment of staff, the organization must make sure that they must have an adequate background.

(b) There must be reasonable restrictions imposed on the employees' access to data based on their role and there must be adequate control on their activities.

(c) Adequate training must be provided to the employees in coping up with cyber crime threats and to report immediately their incidents.

(d) There is a need to make Acts like Data Protection Act (DPA) etc. mandatory for Indian Companies

(e) There is a need for an effective process such as information sharing and cooperation with foreign countries as cyber crimes are not confined to geographic borders.

(f) The Companies must register themselves with the CERT[22] to stay updat-

21. .Available at http://www.keralapolice.org/news site/hitech cyber law.html
22. The computer Emergency Response Term (CERTS) which has been created in order to co-ordinate and respond during major security incidents/events. These organisations identify and address existing and Potential threats and vulnerabilities in the system and co-ordinate with stake-holders to address these threats.

ed with latest vulnerability and treats.
(g) They need to conduct user awareness programmes periodically.
(h) They must perform security audit and implement suitable recommendations.
(i) Companies must adopt global security practices so as to encourage more and more people to prefer online transactions.

In The Case Of Law Enforcement Agencies

(a) There is an urgent need to introduce Graduation as one of the minimum qualification for the police personnel
(b) Basic computer training is a must for the newly recruited police personnel.
(c) The Law of enforcement officers must be provided with adequate training in various broad range of issues relating to
i) Cyber crime
ii) Forensic work
iii) Online sharing procedures and communication protocol
iv) Such training needs to be conducted more frequently for the law enforcement officials so that enforcement units are capable of investing cyber crime
(d) Some of the basic skills required by the law enforcers are :
v) Common forensic computing techniques
vi) Automation of digital evidence analysis
vii) Procedures for data recovery and analysis
viii) Legal considerations
ix) Principles of forensic computing
x) Disk and file systems, forensics,
xi) Operating systems forensics and
xii) Internet and organizational networks
(e) Finally for the complete realization of the provisions of the cyber laws, a co-operative police force is required to encourage victims to report cyber crimes
In the case of Individuals :
(a) Children

Children should not give out identifying information such as Names, Home addresses, School name or Telephone No. in a chat room. They should not give photograph to anyone on the Net without first checking or informing parents or guardians. They should not respond to messages which are suggestive obscene, belligerent or threatening, and not to arrange a face to face meeting without telling parents or guardians. They should remember that people online might not be who they seem.
(b) Parents :

Parents should use content filtering software on PC to protect children from pornography, gambling, hate-speech, drugs and alcohol. There is also software to establish time controls for use of limpets (for example blocking usage after particular time) and allowing parents have visited. Use this software to keep track of the type of activities of children.
c) There must be proper user awareness programmers conducted to educate the people about the seriousness of cyber crime and its prevention.
(a) A counseling session for college students has to educate them on the gravity and consequences emanating from cyber crimes.
(b) Individuals must avoid giving out any personal information about themselves to anyone specially the strangers.
(c) Children should never be allowed to arrange their face-to-face meetings or send their photographs online without informing their parents.
(d) The latest and updated anti-virus software, operating systems, web browsers and email programmers must be used to fight against virus attacks.
(e) One must always thoroughly check

the site he is doing business with.

(f) One must send credit card information only to secured sites.

(g) While chatting on the net one should avoid sending photographs to strangers along with personal data as it can be misused.

(h) Back up volumes of the data should always be kept to prevent loss from virus contamination.

(i) Children should be prevented from accessing obscene sites by the parents to protect them from spoiling their mind and career.

(j) A credit card number shall never be sent to an unsecured site to prevent fraud or cheating.

(k) Effort shall be made to make a security code and programme to guard the computer system from misuse.

(l) We must use a security programme that gives us a control over the cookies that send information back to web sites. Letting all cookies without monitoring them could be risky.

(m) If anyone owns a Website, he must watch traffic and put host based intrusion detection devices on his service. Monitor activity and look for any irregularities.

(n) A check should be kept on the functioning of cyber café and any mishappening shall be reported to the concerned authorities. Efforts should be made to discharge misuse of computers and access to unauthorized data.

d) Cyber Cafes' Responsibilities :

Though the cyber café owners cannot be held liable for anything done by any person accessing the internet without their knowledge, but it is their duty to maintain proper records about their customers. A register wherein the customers can enter their names, address, phone numbers etc. may be installed at the counter of such cyber cafés. They can be allowed to enter the cafe only by checking their ID cards of any, etc. This will enable them to keep track of their customers.

SOME MORE CASES:

Case-I :

First case convicted under Information Technology Act, 2000 of India. The case is related to posting of obscene, defamatory and annoying message about a divorce woman in the yahoo message group. E-mails were also forwarded to the victims for information by the accused through a false e-mail account opened by him in the name of the victim. The posting of the message resulted in annoying phone calls to the lady in the belief that she was soliciting.

Based on a complaint made in the victim in February 2004, the police traced the accused to Mumbai and arrested him within the next few days. The accused as a known family friend of the victim and was reportedly interested in marrying her. She, however, married another person. This marriage later ended in divorce and the accused started contacting to once again. On her reluctance to marry him, the accused took up harassment through the internet.

On 24.3.2004, charge-sheet was filed u/s.67 of I.T. Act, 2000, 5469 & 509 of IPC before the Hon'ble Addl. CMM, Egmore by citing 18 witnesses and 34 documents and material objects.

However, the Court based on the expert witness of Naavi & other evidence produced, including the witness of the Cyber Café owners came to the conclusion that the crime was conclusively proved.

The Court has also held that because of the meticulous investigation carried on by the 1.0, the origination of the obscene

message was traced out and the real culprit has been brought before the Court of Law.

It was held that :

"The accused is found guilt of offences under section 469, 509 IPC & 67 I.T. Act, 2000 and the accused is convicted and is sentenced for the offence to undergo Rigorous Imprisonment for 2 years under 469 IPC and to pay a fine of Rs. 500/- & for the offence u/s. 509 IPC sentenced to undergo 1 year simple imprisonment & to pay a fine of Rs.500/- & for the offence u/s 67 of IT Act 2000 to undergo Rigorous Imprisonment for 2 years and to pay a fine of Rs.4000/- All sentences to run concurrently".

CASE – II :

The information Technology can be misused for appropriating the valuable Government Secrets & data of private individuals & the Government and its agencies. A computer network owned by the Government may contain valuable information concerning Defence & other top secrets, which the Govt. will not wish to share otherwise. The same can be targeted by the terrorists to facilitate their activities, including destruction of property. It must be noted that the definition of property is not restricted to movable or immovable alone.

In R.K. Dalmia Vs. Delhi Administration the Supreme Court held that the word "property" is used in the IPC in a much wider sense than the expression "movable property". There is no good reason to restrict the meaning of the word "property" to movable property only, when it is used without any qualification whether the offence defined in a particular section IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word "property" but on the fact whether that particular kind of property can be subject to the acts carried by the section.

CONCLUSION

To conclude that with the rapid increase in science and technology the cyber crimes are here to say in our modern World. One of the greatest loop-wholes in the field of cyber crime is the absence of comprehensive law anywhere on the World. The problem is further aggravated due to disproportional growth ratio of Internet and Cyber laws. Though a beginning has been made by the enactment of I.T Act and amendments made to Indian Penal Code, problems associated with cyber crimes continue to persists.

Similar efforts have been made by various countries to fight this menace by enacting national legislation but in the long run, they may not prove to be as beneficial as desired. An effort is still wanted to formulate an international law on the use of internet. The I.T. Act, 2000, was passed when the Country was facing the problem of grousing cyber crimes via Internet & other media. It was felt necessary to take certain precautions while operating the internet, etc. Therefore, in order to prevent cyber crime it is important to make public aware of using the computers and modern technology for betterment of the society. Another challenge is that most of the cyber criminals are those who are under the age of majority, therefore, some other legal frame work has to be evolved to real to deal with them. Since cyber World does not recognize any, geographical boundaries, it is a Herculean task to frame laws to cover each and every aspect. But, however, a balance has to be maintained & laws be evolved so as

to keep a check on cyber crimes. However, it is not possible to eliminate cyber crime from the cyber space, but it is quite possible to check them. The only promising step is to make people aware of their rights and duties to report cyber crimes from cyber space, but it is quite possible to check them. The only promising step is to make people aware of their rights & duties to report cyber crimes in time as and when they occur recognizing it as their duty towards the society. The judiciary should also make the application of laws more stringent to check the cyber crimes. No doubt the I.T Act is a welcome step in the cyber world it needs to be suitably modified so as to make it more effective & powerful to combat cyber crimes. If technology is becoming better day-by-day there is also a need for the protection by changing the existing laws or amending the provisions of the existing Act and the protection is required not only at National level, but also at International level.

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TRADE MARK LAW : A Comparative Study About It in the World of Business and Commerce

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ABSTRACT

After the industrial revolution the importance of trade marks was recognised. The result of industrial revolution was the large scale production of goods and the distribution of those goods in the market. Gradually the publicity of those goods was started through the printing media. From the commercial market the consumers purchase their goods or hire services only when they are satisfied regarding the quality and reputation of those goods or services. The manufacturers or the suppliers of goods provide different identifying marks to their goods to make it sure that although the goods produced by them are similar to those manufactured by others, but their distinguishing marks are different so that zxthe consumers can identify it easily. From this point of view trade marks play a very important role in the world of business and commerce. Trade marks help to identify the brand and quality of the goods or services produced by a particular maker or a manufacturer or a company. A comparative study about trade mark law clearly shows us that throughout the world the main objective of trade mark law is to protect the reputation and goodwill of the enterprise who is the owner of that trade mark and to help the consumers so that they must not be misled to identify a product and they must not be misled regarding the sources of any product or services.

Key Words : Trade Marks , Indian Trademark Law, Trademark Registeretion.

PAGE : 7 REFERENCES : 07

INTRODUCTION

A trade mark means a mark which is capable of being represented graphically. Trade marks help to distinguish the goods or services of one person from the goods or services of other persons. Anything which clearly distinguishes a product or service of a company or a manufacturer from that of other company or manufacturer in the commercial market, is generally termed as a trade mark or a service mark, respectively. The term Trade mark and Service Mark is applied to distinguish goods or products of a company from those of other companies or to differentiate service of a service-proving company or firm, from the services of other service organisations, in the era of globalisation. Different types of Trade Marks are- Letter mark, Symbol Mark, Brand, Label and Ticket, Colour combination, Numerals, Containers,

Shape of goods, Packaging, Device etc.

The common, prominent, and popular form of trade marks and service marks which are used in the countries throughout the world are made up of any one or more or a unique combination of the following things- a word or a letter, a numeral, a symbol or a sign, a graphic image or a design, any type of phrase or phrasing, any kind of 2D or 3D shape, any type of unique combination of certain colours, any label, any distinctive packaging, or any distinct sound or any distinct smell. A trade mark must acquire the quality of distinctiveness. We can say that the phonetic, visual as well as similarity in the idea or expression, or resemblance in nature, character, purpose and appearances between the trademarks of two different people or companies, can give rise to the cases of trademark opposition or trademark infringement litigation because these similarities may create the likelihood of confusion or deception among the customers.

A Trade mark Classification List is available to differentiate trade marks in one economic field from the trade marks in other economic fields in the world of business and commerce. There are 45 different classes are found in the trade mark classification list. This trade mark classification list represents trademarks and service marks in the various fields of the broad economic sectors of businesses and industries, professions, and services. To ensure and verify that any particular trademark or service mark is properly registered with any national or international trademarks office, trade mark Symbols are used according to this.

A trademark may be designated by the following symbols: ™ (the "trademark symbol", which is the letters "TM" in superscript, for an unregistered trademark, a mark used to promote or brand goods); sm (which is the letters "SM" in superscript, for an unregistered service mark, a mark used to promote or brand services); ® (the letter "R" surrounded by a circle, for a registered trademark).

For the purposes of making commercial dealings or advertisements, a company can use the symbol TM or SM during the time-period existing between the filing of application for trademark registration, and grant of the registration certificate.
After doing a comparative study regarding the functions of trade mark throughout the world we can say that following are the functions of a trade mark-A trade mark identifies the product and its origin.; Trade mark guarantees the quality of the product; Trade mark advertises the product and tries to make the product popular in the eyes of the people; Trade mark creates an image of the product in the minds of the public, particularly consumers of such goods; Trade mark differentiates products or services, and also the companies connected with these products or services; Trade mark makes products or services prominent before the printing media.

When a trade mark is properly and lawfully registered then the registered trade mark holder obtains some legitimate and privileged rights in relation to the registered trademark. These rights include the authoritative ownership over the registered trademark; authoritative and exclusive commercial use of the trade mark; authoritative and exclusive professional use of the trademark; security and protection of the trademark; hiring and trading of the registered trademark with any national and foreign person or company; and selling of the registered trademark to any person or company.

TRADE MARK REGISTRATION IN INDIA

Under the federal registration system Trade marks and service marks are registered in India. In India there are five regional trademarks offices, which are well-established in Mumbai, New Delhi, Kolkata, Ahmadabad, and Chennai. According to the rules, regulations, and provisions of the Trade Marks Act of 1999, and the Trade Marks Rules of 2002 these zonal trade mark registry offices register, regulate, and protect trade marks and service marks and they are doing these things, taking into account all amendments made to these rules, regulations and provisions so far. These zonal trademarks offices give complete protection to all the trademark rights of the trademark owners throughout India. We can also say that, proper and perfect registration of a trademark in the proper national trademark office creates the primary basis for all international trademark registrations worldwide. India is a member of most of the international conventions and treaties related with trademarks in the world over. The trademark classification list followed in India contains 45 classes. Among it eleven are associated with services in diverse sectors, and the remaining thirty four are allotted to goods and products of various economic fields.

To get a trademark registration in India, application for the registration of trade mark is to be sent to the concerned zonal trademarks office, according to the location of the applicant company.

The major and main tasks or activities which are connected with registration of a trademark [or service mark] are- Creation of Trademark; Trademark Search and Infringement Analysis; Filing of Trademark Application [Form TM-1]; Official Examination and Verification; and Trademark Prosecution for registration.

Generally, within one year any divisional trademark registry office of India completes the process of registration. Here we can say that if any confusion arises regarding the originality and uniqueness of the forwarded trade mark, and if any opposition or infringement allegation by other companies arises, the process of registration of the trade mark may take longer time. The initial registration of a trademark stands valid and effective for a period of ten years and it is counted from the date of its registration.

The application for Trade mark Renewal is filed in Form TM-12 within the expiration of this period with the concerned regional trademark office. It will be helpful for securing trademark rights for next ten years.

The Indian Trademarks Act of 1999, and the Trademarks Rules of 2002, include some important provisions. These are-

1. The Classes for Service Marks have been increased to eleven classes. Classes increase from class 35 to class 45, according to the amendment in the Trade Marks Rules of 2002, made in the year 2010.
2. Multi-Class Application- Now a Single application can be filed for registering trade marks belonging to different classes.
3. Registration of the Collective Marks can be done.
4. The time-period for the validation of the initial registration of a trademark or service mark, has been extended from seven years to ten years.

Trademark Registration and Protection Worldwide

For extending a person's businesses to international horizons in the world of business and commerce, the proper registrations of the concerned trademarks must

be done under one or more international trademark treaties. In the modern times in the international sphere, for protecting the rights of the trade mark owners, we find that there are four most important, significant and influential international trademark conventions or treaties in the entire world. These significant and globally reputed treaties are: **The TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights); Berne or Paris Convention; Madrid Protocol; European Community Trademark (CTM).**

Any company or firm, who desires to extend his businesses to any targeted country of the world, can select any of the above-mentioned international treaties for trademarks, to which the desired country is a member. Each of these treaties has a large number of party countries as members. Again, each of these treaties enables an applicant company to obtain easily and expeditiously registration and protection of its trademark in anyone or all party countries, through filing just a single application.[1]

Indian Trademark Law: A Comparison with EU and U.S. Laws

Indian trademark law is based on a "first to use" system like U.S. trademark law but unlike most European trademark law. Although the principle was codified in the Trade Marks Act 1999 for the first time, a number of earlier judicial decisions gave the term "first to use" a very wide interpretation. Unlike in the United States, **first use anywhere in the world** accompanied by a transborder reputation of the mark is the determinant for ownership of trade mark rights in India.

This transborder reputation can be established in India through the mere availability of literature or advertising materials. Thus, in India the appearance of advertisements in in-flight magazines on flights bound has been considered sufficient evidence to demonstrate a "reputation". A trademark may be registered, on a "proposed to be used" basis even if use of it has not commenced. The mark may remain unused, but still protected, for a maximum period of five years after it is entered into the register. It will become liable for rectification (cancellation) after the expiry of the five year period. This rectification can occur only at the instigation of a third party; the registered trademark owners are not required to periodically prove that their marks are in use in order to maintain their registrations. This is the same as in the EU, but different from the position in the United States. In the United States a registration based on use can be obtained only after a mark is used in U.S. interstate commerce or in commerce between a foreign country and the United States. In so many countries of the world registration will be cancelled automatically after five years if use is not shown.

The position in the EU and India also differs in one important respect. In India, some of the provisions regarding cancellation of trade mark registration are different from the provisions of EU.

What Constitutes "Use" in India?

Use of a mark outside India or a transborder reputation of a mark in India may not be enough to sustain a registration when it is attacked on grounds of non-use. Some use of the mark in India is required. Although "use" generally has been given a broad meaning by the Indian courts in so many cases.

Hardie Trading Ltd. And Anr vs Addisons Paint And Chemicals Ltd on 12 Sep-

1. http://www.mondaq.com/india/x/320302/Trademark/Registration+And+Protection+Of+Trademarks+In+India+And+Abroad

tember, 2003 The Supreme Court of India says that "use" may be "non-physical" but must be "material", that is, meaningful.

The test itself is not that different from the test in the EU, where use must be "genuine" and not mere token use. For instance In the case of well-known marks, a single advertisement may be considered sufficient. In a recent judgment in a case involving Toshiba Corporation, the Supreme Court of India has given importance on it.

Dilution

In the United States, the owner of a famous and distinctive mark has a cause of action for dilution. This applies to dilution by blurring and dilution by tarnishment. In the EU, the trademark need not be "famous" but it must be known by a significant part of the public who are concerned with respect to the products or services covered by the mark.

The principle of dilution has traditionally been well recognized in Indian trademark jurisprudence. With the result of it that the proprietors of globally well-known trademarks, including APPLE, CARTIER, CATERPILLAR, DUNHILL, FORD, HONDA, HYUNDAI and MERCEDES-BENZ, have succeeded in passing-off actions in India against users of identical or similar marks in relation to dissimilar goods.

In **Daimler Benz Aktiegesellschaft ... vs Hybo Hindustan on 10 November, 1993**[2], the court observed that, "It will be a great perversion of the law relating to trademarks and designs, if a mark of the order of the 'Mercedes Benz'... is humbled by indiscriminate colourable imitation by all or anyone." Today, in Section 29 of the Trade Marks Act 1999 dilution as a concept finds statutory recognition.

Enforcement

As in the United States and the EU, administrative proceedings are available in India for dealing with matters related with the register. Proceedings are conducted before the Registrar of Trademarks, and appeals are filed with the IPAB.

Generally, matters concerning the register are looked upon by the Registrar and matters concerning use are dealt with by the court.

There are 21 High Courts in India, among which four (Delhi, Mumbai, Kolkata and Chennai) have the authority to hear intellectual property cases. Those cases that lie outside the jurisdiction of these four High Courts are first heard by the relevant district court and then on appeal by a High Court.

Among one of the four High Courts who have jurisdiction over a trademark dispute, one of the following conditions must be satisfied: (1) the cause of action arises in the jurisdiction of one of the High Courts; (2) the defendant's place of business is in the jurisdiction of one of the High Courts; or (3) the plaintiff's place of business is in the jurisdiction of one of the High Courts. A defendant or plaintiff will have a "place of business" in a particular jurisdiction if his products are sold in that jurisdiction or if he providesafter-salesservicethere.

For brand owners who want to file a lawsuit before one of the four High Courts and find that they are unable to satisfy any of the conditions which would allow them to do so, then a solution is offered by the court in **Glen Raven Mills Inc. vs Vaspar Concepts Private Ltd. And ... on 1 October, 1995**[3]. This case establishes

2. equivalent citations: AIR 1994 Delhi 239, 1994 RLR 79

that a plaintiff may claim that a particular High Court has jurisdiction, on the basis of a cause of action, by making a "trap" purchase of the defendant's goods from the relevant locality. A cause of action will arise in any jurisdiction where the defendant was willing to make its goods available in "commercial quantities."

Recently, in cases where the defendant does not have a strong financial position the courts and mediators have tried to encourage parties to consider alternative remedies in lieu of damages. Examples include community service and participation in antipiracy initiatives. In a recent matter involving an infringement of the trademarks of a global media giant by an Indian media company selling DVDs featuring nursery rhymes, the defendant offered to suffer an injunction and distribute free non infringing DVDs to various charities in lieu of monetary compensation.

In **Bajaj Auto Ltd., State Of ... vs Tvs Motor Company Ltd. on 16 February, 2008**[4], the court held that all courts and tribunals in the country hearing IP cases should proceed with such matters on a day-to-day basis and final judgment should be given, normally, within four months from the date of filing of the suit. Although this timeline sounds ambitious and difficult to achieve in light of the backlog of cases in India, the intent is loud and clear: if attorneys are willing to push a matter to an expeditious conclusion, the judiciary will not stand in the way.[5] Most district courts have started to implement this judgment and most district courts have started to treat IP matters as equal in significance to criminal and other civil cases.

Now we can say that India is fast catching up with other parts of the world in the development of its trademark laws and practice.

International Trademark Registration

Trademark registration is territorial in nature. Separate applications need to be filed in each country where a company wishes to register its trademark. If a company plans to sell and market internationally, it is essential to register its trademarks in those countries. Usually, the party who first registers a mark owns it. Therefore, it is significant to register a company's trademarks in each country where the company wants to start its market.

International Application under Madrid Protocol

India has joined the Madrid protocol with effect from 8th July 2013. The Madrid system for the international registration of trademarks provides one single and cost-effective procedure for the registration of a mark in several territories.

Advantages of filing an International Application under Madrid protocol[6]

1. Lower costs compared to individual foreign filings
2. Managing renewals, change in address, change in ownership is easier and more cost-effective
3. Additional countries may be designated at a later stage

The relevance of Trademarks registration

Under the European laws, once a Trademark is registered, the owner obtains the exclusive right to use it on the goods and services in the product classes in which it is registered, and to prevent others from

3. Equivalent citations: 1995 IVAD Delhi 569, 60 (1995) DLT 616, 1996 (36) DRJ 187.
4. Equivalent citations: (2008) ILLJ 726 Mad, MIPR 2008 (1) 217, 2008 (36) PTC 417 Mad
5. http://www.inta.org/INTABulletin/Pages/IndianTrademarkLawAComparisonwithEUandUSLaws.aspx
6. http://www.lrswami.com/page/foreign-trademark-registration

exploiting it, in the same fields.

Under Indian Laws, a registered Trade Mark gives its proprietor the exclusive right to use that Trade Mark for the registered category of goods or services.

Manner of filing

Under European laws, an application can be filed via: Online application; By regular mail; By delivery services; Personally at the reception of the Office; or By tele fax
The application can be filed both by (i) a natural person and (ii) a legal entity.
Under Indian laws, applications can be filed in two ways: Paper filing on prescribed form and in the prescribed manner, and E-filing.

Under EU laws, an application can be filed in twenty-three (23) official languages of the European Union as first language and second language must be indicated which may be either Spanish, German, English, French or Italian. However, under the Indian laws, an application is filed in English language.

Under European laws, the examination for registrability is a procedure structured in three main stages. Under Indian Laws, substantive examination will cover the following aspects: [7]

1. Under section 9, which prescribes "absolute grounds for refusal".
2. Under section 11, which sets out "relative grounds for refusal"
3. Under section 12, to check whether mark could be registered on the basis of "honest concurrent user" when supported by evidence to that effect;
4. Under section 13, to see whether the registrability of mark is prohibited on the ground that the mark consists of name of a chemical element or an international non- proprietary name.

CONCLUSION

The basic to be understood in the study of the principles relating to trade marks is that a trade mark is used for the function it is intended to serve, which is to indicate to the public the source or origin of the goods or services to which a particular trade mark relates, as distinguished from identical or similar goods or service of another. After comparing with the provisions of the trade mark law between our country and other countries of the world we can say that the Trade Marks Act, 1999 is an Act to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trademarks, for goods and services and for the prevention of the use of fraudulent marks. Though law relating to trade marks is enacted to protect the trade marks, but it is not always enough to protect the trade marks. So, more rules regarding the protection of trademarks are necessary for substantial development of business and commerce. The Supreme Court of India and the High Courts of India occupy a unique position in protecting trade marks. Indian Judiciary has tried to make a great development in the world of business and commerce in the era of globalisation by protecting the trade marks properly.

7. http://www.indiaitaly.com/REP_Differences%20of%20IPR%20Laws_EU%20&%20India_Web.pdf

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HUMAN RIGHTS OF THE FARMERS AND THE AGRICULTURE SECTOR IN INDIA

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ABSTRACT

According to official estimates, more than a quarter of a million farmers have committed suicide in the last sixteen years-the largest wave of recorded suicides in the history of mankind. Most of the affected farmers are cash crop farmers and cotton farmers, in particular. Based on the available statistics, a farmer commits suicide every thirty minutes. While this is the official number, these statistics do not account for the actual number of farmer suicides taking place and the large number of lives that are affected due to the death of even single farmer in the family. Women, for example, are often excluded from farmer suicide statistics because most do not have title to land—a common prerequisite for being recognized as a farmer in official statistics and programs.

Cotton exemplifies India's general shift toward cash crop cultivation, a shift that has contributed significantly to farmer vulnerability, as evidenced by the fact that the majority of suicides are committed by farmers in the cash crop sector. The cotton industry, like other cash crops in India, has also been dominated by foreign multinationals that promote genetically modified seeds and exert increasing control over the cost, quality, and availability of agricultural inputs.

Key Words : Human Rights of Farmers, Farmer's Suicides, Government Inaction,

PAGE : 13 REFERENCES : 65

INTRODUCTION

This paper focuses on the human rights of Indian cotton farmers and of the estimated 1.5 million surviving family members who have been affected by the farmer suicide crisis to date. These farmers and their families are among the victims of India's long-standing agrarian crisis. Economic reforms and the opening of Indian agriculture to the global market over the past two decades have increased costs, while reducing yields and profits for many farmers, to the point of great financial and emotional distress. Indebtedness is a major and proximate cause of farmer suicides in India. Many farmers, ironically, take their lives by ingesting the very pesticide they went into debt to purchase. The Indian government's response to the crisis—largely in the form of limited debt relief and compensation programs—has, by and large, failed to address the magnitude and scope of the problem or its underlying causes.

This paper also aims to conclude with policy recommendations to address and uproot the agrarian crisis in India. Thus, the paper concludes that taking the steps necessary to prevent farmer suicides and ensure farmers' rights is not just a matter of sound policy or basic humanity for the Indian government; it is also a matter of hard legal obligation. India is a State Party to multiple international human rights treaties and however, India with its failure to address this nationwide crisis of farmers' suicides has also violated a number of human rights including the rights to: life, health, water and food, an adequate standard of living, equality and non-discrimination, and the right to an effective remedy, all of which are enshrined under Part III of the Constitution. It is neither inevitable, nor lawful, that the conditions which have led to this wave of suicides continue. The Indian government can, and must, act to put an end to this tragedy.

INDIA'S ECONOMIC POLICIES AND THE COTTON SECTOR- GENESIS OF INDIA'S AGRARIAN CRISIS

During the 1990s, the World Bank[1] , the International Monetary Fund (IMF) and other international financial institutions (IFI) encouraged India to adopt economic policies focusing on removal of tariffs, liberalization of international trade and privatization. Resultantly, India opened up its markets to global trade and leading to the entry of multinational corporations. The implementation of IMF, IFI-approved policies also consequently resulted in abolition of Indian agricultural subsidies that had supported the farmers for a long time[2].

As a result of these economic reforms, emphasis was placed on switching from food crops to cash crops like cotton by the Indian government, thrusting the Indian farmers to competition in the world market, thus also exposing them to price volatility.

In order to compete with the global entrants and find a place for themselves in the global market, Indian cotton farmers turned to new, genetically-modified seeds which promised to bear higher yields and providing greater resistance against pests[3].

These genetically modified crop-seed produced by the multinational companies only became available after the Indian markets opened up under economic reforms [4].

1. Jason Motlagh, India's Debt-Ridden Farmers Committing Suicide, SAN FRANCISCO CHRON., Mar. 23, 2008, available at http://articles.sfgate.com/2008-03-22/news/17168778_1_suicides-farmers-interest-rates. ("While India's economy surges forward on the crest of globalization, thousands of farmers are taking their own lives every year to escape mounting debt and an uncertain future."); Smita Narula, Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective, 255 WISCONSIN INT'L. L.J. 284 (2008), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1275789_code419245.pdf?abstractid=1273803&mirid=1.
2. THE DAMAGE DONE: AID, DEATH, AND DOGMA 16-19 (2005), available at http://www.christianaid.org.uk/Images/damage_done.pdf (describing the liberalization agenda of the World Bank, World Trade Organization, and International Monetary Fund).
3. See Food First Information and Action Network (FIAN), Parallel Report: The Right to Adequate Food in India 15 (2008), available at http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/ParallelReport_India_FIAN.pdf ("In 1998, the World Bank's structural adjustment policies forced India to open up its seed sector to global corporations [like Cargill, Monsanto, and Syngenta]."
4. See Neelima Deshmukh, Cotton Growers: Experience from Vidarbha, in AGRARIAN CRISIS AND FARMER SUICIDES 175, 185 (R.S. Deshpande & Saroj Arora eds., 2010) ("Cotton has become the deciding factor of politics in Maharashtra...In response to the ever swelling number of suicides by the farmers of Vidarbha, Prime Minister, Dr Manmohan Sing visited the affected area along with his entourage on 1 July 2006[.]").

MULTINATIONAL CORPORATIONS AND INDIA'S COTTON SECTOR

Multinational agribusiness corporations, taking advantage of India's market liberalization began promoting the introduction of genetically-modified seeds into Indian agriculture[5] . Promises of higher yield, and the aggressive promotion of genetically modified crops such as the approval of Monsanto's Bollgard Bt Cotton by the Genetic Engineering Approval Committee (GEAC), and hundreds of more variants of Bt. Cotton produced by various corporations, leading to the rapid increase in Bt. Cotton cultivation[6].

Expensively priced as compared to non-Bt cotton seeds (almost 10 times), farmers soon began to realize that what was earlier thought to be a god investment, is in fact, a heavy burden on both the life of the farmer as well as his family, only pulling them into a deep economic crisis. Hoping for economic security, farmers purchase these high-yielding varieties of cotton-crop seed through humungous loans from state banks and from private, small-time money lenders[8].

High costs and impossibility of replanting the cotton seeds the following year, forces small holder farmers to resort to community money-lenders, who often charge high interest rates[9].

However, generating high yields with Bt cotton seeds also requires much higher amounts of water than other cotton yield. This makes farmers dependent upon proper access to irrigation facilities and as Indian agriculture is heavily dependent on rains, the crop often fails. When the crop fails, farmers are unable to repay their loans. Uncertain rains and lack of access to proper irrigation facilities are often insurmountable hurdles for small holder farmers[10].

Thus, erratic rainfall patterns, excessive drilling of borewells and the usage of groundwater for agriculture threatens to deplete water tables, resulting in greater water scarcity in the long-term. Thus, Bt cotton has short-term revenue gains but heavy losses in the long term.

The fact that Bt cotton seed requires more water is not communicated effectively to farmers. Firstly, the warning labels on Bt cotton boxes instructs farmers to use the seed only on irrigated fields, the warning labels

5. See BHAGIRATH CHOUDHARY & KADAMBINI GAUR, INT'L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, BT COTTON IN INDIA: A COUNTRY PROFILE 4-5 (2010), available at http://www.isaaa.org/resources/publications/biotech_crop_profiles/bt_cotton_in_india-a_country_profile/download/Bt_Cotton_in_India-A_Country_Profile.pdf (purporting that adoption of Bt cotton in India is 85 percent of cotton area farmed).
6. Id.
7. Vidarbha, Maharashtra, a locus of cotton production, is thus a sort of epicenter of the crisis. Srijit Mishra, Agrarian Distress and Farmers' Suicides in Maharashtra, in AGRARIAN CRISIS IN INDIA 126, 133 (D. Narasimha Reddy & Srijit Mishra eds., 2009) ("The plight of Western Vidarbha [in Maharashtra] is in some sense linked with that of cotton or rather its declining profitability because of increasing costs and relatively lower yields.").
8. P. Sainath, Men of Letters, Unmoved Readers, THE HINDU, May 6, 2010, available at http://www.thehindu.com/opinion/columns/sainath/article422651.ece.
9. P. Sainath, Of luxury cars and lowly tractors, THE HINDU, Dec. 27, 2010, available at http://www.thehindu.com/opinion/columns/sainath/article995828.ece (explaining that although official data is only available until 2009, "we can assume that 2010 has seen at least 16,000 farmers' suicides. (After all the yearly average for the last six years is 17,104).").
10. Id.

are in English, a language not understood by uneducated, illiterate farmers[11].

Additionally, multinational companies have encouraged the adoption of Bt cotton seed the adoption of Bt cotton seed by setting up demonstration at large, irrigated farmer that are more likely to have successful Bt cotton yields[12]. These demonstrations are attended by input dealers, middlemen only and small groups of farmers. These groups then disseminate information to this agricultural technology to other farmers. Moreover, the information the farmers have may be skewed by the allegedly deceptive advertising practices of multinationals[13].

Thus, the combination of the above reasons: India's economic reforms, the influence of multinationals in the cotton farming sector, and erratic climatic conditions have led to the deepening economic crisis.

II. FARMER'S SUICIDES AND THE GOVERNMENT INACTION

Improper Recording of Actual Number of Suicides

Farmer's suicides have evidentially been high in the cotton producing states of the country, in the states of Maharashtra, Andhra Pradesh, Karnataka, Chattisgarh, M.P., Tamil Nadu and West Bengal. The main source of data for farmer suicides, India's National Crime Bureau[14] , under-represents and misrepresents the actual number of farmer suicides. One of the reasons is the restricted definition of farmer, who is an individual having title to his or her land, fails to adequately capture the extent of the problem.

The statistics ignores women who perform large amount of agricultural work. In the same way, *dalit* (untouchables) and *Adivasi* (tribal community) farmer suicides may also be insufficiently reflected in the official data, as most do not have clear title to the land they are farming. Moreover, family members of farmers who have committed suicide may not be counted as farmer suicides, if the title has not been formally passed on to them[16].

A broader approach to record of farmer suicides would lead to complete understanding of the magnitude of the impact of the agrarian crisis.

11. P Sainath, Suicides are about the living, not the dead, THE HINDU, May 21, 2007, available at http://www.thehindu.com/2007/05/21/stories/2007052103541100.htm.
12. See SRIJIT MISHRA, INDIRA GANDHI INST. OF DEV. RES., MUMBAI, RISKS, FARMERS' SUICIDES AND AGRARIAN CRISIS IN INDIA: IS THERE A WAY OUT? 7 (Sept. 2007), available at http://www.igidr.ac.in/pdf/publication/WP-2007-014.pdf (describing a study in Vidarbha wherein 96 of 111 farmers who committed suicide were indebted).
13. Id.
14. These figures are collated from data available from the National Crime Records Bureau, a division of the Ministry of Home Affairs. See Ministry of Home Affairs, National Crime Records Bureau, Accidental Deaths and Suicides in India Reports for previous years, http://ncrb.nic.in/adsi/main.htm (last visited May 7, 2011) [hereinafter NCRB] (providing reports for 1995-2008); MINISTRY OF HOME AFFAIRS, NAT'L CRIME RECORDS BUREAU, ACCIDENTAL DEATHS AND SUICIDES IN INDIA 2009 (2009) [hereinafter NCRB 2009], available at http://ncrb.nic.in/CD-ADSI2009/ADSI2009-full-report.pdf (providing 2009 data).
15. Id.
16. Id.; Jason Motlagh, India's Debt-Ridden Farmers Committing Suicide, SAN FRANCISCO CHRON., Mar. 23, 2008, available at http://articles.sfgate.com/2008-03-22/news/17168778_1_suicides-farmers-interest-rates. ("While India's economy surges forward on the crest of globalization, thousands of farmers are taking their own lives every year to escape mounting debt and an uncertain future.").

Failure to Provide Compensatory Relief by the Government

The government's inaction has fallen painfully short of alleviating the actual problem: the emphasis on cash crops and encouragement to multinational companies and genetically modified crops. Government responses at both state and Centre level in the form of debt waiver and compensation programs, have aimed to alleviate the proximate cause of farmer suicides: indebtedness.

Due to this skewed approach in providing relief, both the Centre and the state governments' plans of relief have met with limited success.

Though the government has implemented financial assistance programs, such programs have been sporadically implemented and have served as merely short term solutions. The unwillingness of the Indian government to invest in irrigation, improve the availability of rural credit, or providing farmers with more seed purchasing options reflects a broader problem: lack of adequate investment in agriculture[17].

Thus, farmers' suicides is a human rights issue as much as it is an agricultural crisis. While is signatory to a number of international human rights concerns, this widespread farmer suicides also signal a crisis of failure on the part of the Indian government to live up to its obligations to respect, protect, and fulfil human rights[18] , as required under international rights and humanitarian law. On several occasions, international human rights bodies have called on the Indian government to address farmers' suicides[19].

III. THE HUMAN RIGHTS OF FARMERS AND INDIAN HUMAN RIGHTS OBLIGATIONS: THE CONSTITUTIONAL MANDATE

India is a State-Party to a number of major human rights treaties. Of particular relevance to this issue are the following:

- The International Covenant on Civil

17. See Special Rapporteur on the right to food, Report of the Special Rapporteur on the right to food, Olivier De Schutter: Building resilience: a human rights framework for world food and nutrition security, 8, delivered to the 9th Session of the Human Rights Council, U.N. Doc. A/HRC/9/2 (Sept. 8, 2008), available at http://www.srfood.org/images/stories/pdf/officialreports/or1-a-1-hrc-9-23final-eng.pdf (noting that "investment in agriculture... has been neglected for many years both in the definition of priorities of official development assistance and in national budgets[.]"
18. For example, in 2008, the Committee on Economic, Social and Cultural Rights, ("the ESCR Committee"), had raised serious concerns about the increasing incidences of suicides among farmers.
19. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Consideration of Reports Submitted Under Articles 16 & 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights: India, 29, 69, U.N. Doc E/C.12/IND/CO/5 (May 2008), available at: http://www2.ohchr.org/english/bodies/cescr/docs/co/E.C.12.IND.CO.5.doc. The relationship between extreme poverty and human rights has also been addressed by U.N. human rights experts. In 2008, for example, the U.N. Independent Expert on Human Rights and Extreme Poverty underscored the relationship between poverty and human rights, noting that "Poverty can be both a cause and a result of human rights denials," and that "while the non-fulfillment of human rights often causes poverty, poverty in many cases is a cause of human rights violations." Independent Expert on the question of human rights and extreme poverty, Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, 11, delivered to the 63rd Session of the U.N. General Assembly, U.N. Doc A/63/274 (Aug. 13, 2008), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/459/30/PDF/N0845930.pdf?OpenElement. The Independent Expert added that, "The protection of human rights is instrumental to the reduction of extreme poverty.

and Political Rights (ICCPR)[20]

- The International Covenant on Economic, Social and Cultural Rights (ICESCR)[21]
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) [22]
- The Convention on the Rights of the Child (CRC) [23]
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[24]

HUMAN RIGHTS OF INDIAN FARMERS

The farmer suicide crisis in India implicates and violates the right to life; the right to an adequate standard of living; the right to work; the right to food; the right to water; the right to health; and the right to an effective remedy, among other rights: all of which are enshrined and guaranteed under international human rights instruments and Fundamental Rights of the Indian Constitution. Here, as in many contexts, these rights are inexorably linked as the violation of one informs the violation of the others.[25] In addition, ensuring one right will help to ensure the protection of the others. The following provides an outline of the legal underpinnings of each right and how each is affected by the current crisis.

The Right to Life

The ICCPR affirms that "[e]very human being has the inherent right to life" and obligates States to ensure that "[n]o one shall be arbitrarily deprived of his life." [26] States that have ratified the ICCPR, such as India, are obligated to respect, protect, and fulfil the right to life. Under the duty to *respect*, India must avoid taking steps which would erode the conditions necessary for Indian farmers to enjoy the inherent right

20. India acceded to the ICCPR on April 10, 1979. UN Treaty Collection, ICCPR, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Apr. 12, 2016).
21. India acceded to the ICESCR on April 10, 1979. UN Treaty Collection, ICESCR, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Apr. 12, 2016).
22. India signed CEDAW on July 30, 1980, and ratified it on July 9, 1993. UN Treaty Collection, CEDAW, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Apr. 12, 2016).
23. India acceded to the CRC on December 11, 1992. UN Treaty Collection, CRC, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr. 12, 2016).
24. India signed ICERD on March 2, 1967, and ratified it on December 3, 1968. UN Treaty Collection, ICERD, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Apr. 12, 2016).
25. General Comment No. 3, 12. Especially vulnerable members of the population include, in the Committee's view, the disabled (ECOSOC, Comm. on Econ. Soc. & Cultural Rights, General Comment No. 5: The Rights of Persons with Disabilities, 9, U.N. Doc. E/1995/22 (Dec. 9, 1994), available at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument), the elderly (ECOSOC, Comm. on Econ. Soc. & Cultural Rights, General Comment No. 6: The economic, social, and cultural rights of older persons, 17, U.N. Doc. E/1996/22 (Dec. 8, 1995), available at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/482a0aced8049067c12563ed005acf9e?Opendocument), and the homeless (ECOSOC, Comm. on Econ. Soc. & Cultural Rights, General Comment No. 4: The right to adequate housing (Art. 11(1)), 13, U.N. Doc. E/1992/23 (Dec. 13, 1991), available at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/469f4d91a9378221c12563ed0053547e?Opendocument.).
26. International Covenant on Civil and Political Rights [ICCPR], art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171, available at http://www2.ohchr.org/english/law/pdf/ccpr.pdf.

to life. Under the duty to *protect*, India must ensure that third party actors, including businesses, do not interfere with the enjoyment of this right[27].

The obligation to fulfil the enjoyment of the inherent right to life requires States to take a number of positive measures. The Human Rights Committee—the UN body responsible for monitoring States' compliance with the ICCPR—has noted that the phrase "'the inherent right to life"[28] encourages States to take action to, among other things, "reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." [29]

As a prerequisite to implementing these positive measures, States must design and implement programs that seek to achieve these goals. As a signatory to International Convent on Civil and Political Rights (ICCPR), Indian Constitution also guarantees right to life and personal liberty[30] , interpreted in a multitude of ways to include varied dimensions of enjoying a "good and healthy" [31] life.

With the India has fallen far short of its obligations to respect, protect, and fulfil Indian farmers' right to life. Official data collection on farmer suicides is both incomplete and inadequate: it undercounts the numbers and discounts entire categories of farmers who have committed suicide by employing restrictive definitions of who constitutes a "farmer". As noted above, information gathering is a crucial element of the obligation to fulfil the inherent right to life, as it informs the kinds of positive measures that India must take under the ICCPR and under the Indian Constitution.

The Right to Adequate Standard of Living

Under the ICESCR, the Indian government is obligated to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and to continuous improvement of living conditions,[32] " and to "take appropriate steps to ensure the realization of this right,[33] "and this has also been enshrined under Part III of the Indian Constitution as a Fundamental Right . [34]

The Indian government has not taken appropriate steps to ensure the realization of

27. Human Rights Comm., General Comment No. 6: The right to life (art. 6), ¶ 5 (Apr. 30, 1982) [hereinafter General Comment No. 6: The right to life], available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument.
28. Id.
29. Id.
30. Article 21: "Protection of Life And Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law".
31. In Maneka Gandhi v. Union of India, the Supreme Court gave a new dimension to Art. 21 and held that the right to live the right to live is not merely a physical right but includes within its ambit the right to live with human dignity. Elaborating the same view, the Court in Francis Coralie v. Union Territory of Delhi, observed that:"The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self."
32. Supra note 21.
33. Id.
34. Supra note 31.

the right to an adequate standard of living. The insurmountable debt crushes the opportunities of the farmers to enjoy the right to an adequate standard of living or provide for the basic living needs of their families . [35]

The Indian government's failure to address the rush of farmer suicides is prominent in the context of its obligations under the right to an adequate standard of living. As noted above, the suicide epidemic has been going on for more than a decade, yet the government has done little to intervene and regulate the corporations that are contributing to this crisis. Nor has it taken adequate steps to address other underlying causes, such as the removal of subsidies and the lack of general support to the farming sector.

The Right to Food

The right to food is guaranteed under the ICESCR, which includes both the "fundamental right of everyone to be free from hunger" [36] as well as the broader right to adequate food[37] . India being signatory to this treaty, has a core obligation to take the necessary action to mitigate suffering of the economically-disadvantaged sections of the society.

This includes the duty to provide special programs for socially vulnerable groups and when individuals are unable to enjoy this right by their own means.[38] This broader right to adequate food entails "[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture," [39] as well as the accessibility of food: "[e]conomic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised... [and p]hysical accessibility implies that adequate food must be accessible to everyone..." [40] High input costs, combined with lower yields, decreases the income of farmers, thereby making it more difficult for them to afford food.[41] Furthermore, when debt leads a farmer to commit suicide, surviving family members inherit the debt, while losing a primary income-earner, making it even more difficult to afford sufficient and nutritious food. [42] India has clearly failed to re-

35. Kishor Tiwari states flatly that the cotton farmer "is not earning anything." According to a government survey cited to in 2007, Vidarbha cotton farmers are suffering net losses from their crops while the costs of food, education, and health care have all increased: Vidarbha Farmers' Suicides Inspire Highway Blockade Across India, ENVTL. NEWS SERVICE, Oct. 3, 2007, http://www.ens-newswire.com/ens/oct2007/2007-10-03-01.asp.
36. Supra note 21.
37. Id.
38. Id. at 12-13.
39. Id. at 56-60.
40. Id.
41. Vidarbha Farmers' Suicides Inspire Highway Blockade Across India, ENVTL. NEWS SERVICE, Oct. 3, 2007, http://www.ens-newswire.com/ens/oct2007/2007-10-03-01.asp.
42. In its recommendations after India's most recent period State report submission under the ICESCR, the ESCR Committee "[drew] the attention of the State party [India] to para. 19 of the Committee's General Comment No.12 on the right to adequate food (1999)." Consideration of Reports Submitted Under Articles 16 & 17 of the Covenant, supra note 173, 69. Paragraph 19 enumerates, non-exhaustively, the "[v]iolations of the right to food [that] can occur through the direct action of States or other entities insufficiently regulated by States." General Comment No. 12, supra note 189, 19. The violations listed include: "the formal repeal or suspension of legislation necessary for the continued

spond to the food needs of its struggling farmers and the surviving families of suicide victims.

Also under the ICESCR, India must act to "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources."[43] By encouraging farmers to switch toward cash crop cultivation, the Indian government promotes a move away from domestic food cultivation.[44] As evidenced above, India's economic reforms have led to the development of an agrarian system that devalues food-related farming and undermines food security, in violation of the right to food.

The Right to Water

The right to water is explicitly and implicitly guaranteed under international human rights treaties[45] and was also recently affirmed by a U.N. General Assembly resolution. As a State Party to the ICESCR, India is obligated to "ensure access to the minimum essential amount of water... [and] physical access to water facilities or services that provide sufficient, safe and regular water"[46] and to "ensure that there is adequate access to water for subsistence farming."[47] India has not taken steps to increase access to water for farmers in need, in direct contravention of its human rights obligations. To the contrary, farmers' access to water is likely to become even more restricted in the future, as India moves toward privatizing water and irrigation pathways.[48]

Bt cottonseeds require more water than traditional seeds, thereby putting a strain on already-scarce water resources. As a result, water may be funnelled away from personal needs and food production toward irrigating crops. Farmers are also

enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations." Id.

43. Id.
44. Special Rapporteur on the right to food, Report of the Special Rapporteur on the right to food, Olivier De Schutter:
45. Supra note 20, 21, 22, 23.
46. Id.
47. Id.
48. The right to water is explicit in CEDAW and the CRC. See CEDAW, supra note 34, art. 14(2) ("States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:...(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."); CRC, supra note 235, art. 24(2): "States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:...(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.").

not adequately informed of the increased water needs of Bt cotton by the companies that market the seeds. [49] This lack of information leads to crop failure. Businesses should likewise respect human rights and refrain from taking steps that would interfere with the enjoyment of these rights.

The Right to Health

India is obligated to recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Additionally, it requires the availability and accessibility of "[f]unctioning public health and health-care facilities, goods and services, as well as programmes." The U.N. General Assembly adds that "[a]ll persons have the right to the best available mental health care, which shall be part of the health and social care system."[50]

In addition, India is obligated to recognize the "right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."[51] The mental and physical health of children is severely compromised when a family member commits suicide and children are forced to work.

Pursuant to the human rights treaties to which India is a party, India must ensure that no aspect of its policy has the purpose or effect of discriminating on the basis of, *inter alia*, grounds such as race, colour, descent, birth, national, ethnic or social origin, religion, and sex. [52] The CERD Committee—the U.N. body responsible for monitoring States' compliance with ICERD—has made it clear that the prohibition of discrimination on the basis of "descent" includes a prohibition of discrimination on the basis of caste[53] . Under ICERD, India is obligated to guarantee equality in the enjoyment of civil, political, economic, social and cultural rights. The treaty also provides that States must prohibit—and take steps to prevent—discrimination by both State officials and organs and by private parties.

Research indicates that the farmer suicide crisis has caste-based dimensions in that "lower-caste" farmers, who often lack the necessary technical knowledge to

49. Human Rights Council, Human rights and access to safe drinking water and sanitation, 3, U.N. Doc. A/HRC/15/L.14 (Sept. 24, 2010), available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/163/09/PDF/G1016309.pdf?OpenElement ("Affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.).
50. See Ramya Kanna, Spate of farmers' suicides in India worrying WHO, THE HINDU, Oct. 15, 2006, available at http://www.hindu.com/2006/10/15/stories/2006101514820800.htm. Then-Director of the WHO Department of Mental Health and Substance Dependence, Benedetto Saraceno, expressed concern about the farmer suicides in India, which he believes are the result of "[u]ndiagnosed and untreated depression, along with catastrophic social circumstances and easy access to methods of suicide." Saraceno stated that "[t]he WHO was working on putting on the agenda of the Indian Government the need to reduce access to the usual methods of suicide [namely pesticide ingestion]" noting that for example, "[s]ome methods adopted worldwide that seemed to have worked included making it difficult to open bottles of pesticide and reducing the toxicity.").
51. Id.
52. CRC, supra note 35, art. 24(1).
53. UDHR, supra note 23, art. 2; ICERD, supra note 29, arts. 1, 2, 5; ICESCR, supra note 13, arts. 2(2), 3; ICCPR, supra note 191, arts. 2(1), 3, 24(1); CRC, supra note 35, art. 2; CEDAW, supra note 34, arts. 1, 2, 11(2); General Comment No. 20, supra note 15, 29, 30, 32-34.

cultivate commercial crops due to socio-economic barriers, may be hit particularly hard by the Bt cotton-debt crisis. [54] "Lower-caste" farmers and their families also suffer from discriminatory laws and policies that prevent them from gaining the title to their land and farmers who do not have title to the land they farm are not officially considered farmers by the government and, thus, surviving family members are deprived of compensation when the head of the household commits suicide.[55]

In addition, many women farmers are unable to obtain title to land.[281] As a result, women are deprived of agricultural assistance and if women commit suicide, their surviving family members are unable to receive compensation from the government, since it does not constitute an official "farmer suicide." Furthermore, women without land titles are unable to access official lines of credit. [56]

By excluding women farmers from the farmer suicide count, the Indian government is also, unable to assess the particular rights violations of women farmers. As has been noted by the CEDAW Committee—the U.N. body responsible for monitoring States' compliance with CEDAW—"statistical information is absolutely necessary in order to understand the real situation of women."[57] Thus, India is failing to meet the requirements of CEDAW to eliminate discrimination against women and ensure equality, particularly in the case of rural women.

CONCLUSION AND RECOMMENDATIONS

As evident from the above discussion, India has collectively failed to address the issue of farmer suicides and the current government solutions have been largely inadequate to address the problem. Thus, there is an acute need to address the crisis and adhere to its human rights obligations.

The author advances the following recommendations that may be applied in order to address the issue.

54. See Comm. on the Elimination of Racial Discrimination, General Recommendation No. 29: Article 1, paragraph 1 of the Convention (Descent), 1, U.N. Doc. A/57/18 (Nov. 1, 2002), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f0902ff29d93de59c1256c6a00378d1f?Opendocument ("Strongly reaffirming that discrimination based on 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights[.]").
55. See B.B. Mohanty, 'We are Like the Living Dead': Farmer Suicides in Maharashtra, Western India, 32 J. OF PEASANT STUD. 243, 259 (2005), available at http://www.informaworld.com/smpp/ftinterface~db=all~content=a714004004~fulltext=713240930 (citing Gail Omvedt, Dalit Suicides?, THE HINDU, Apr. 24, 1999) ("[T]he problem facing small farmers from the lower castes is simply stated. The cultivation of cotton requires extensive knowledge that was virtually new to such producers, not least because more than 58 per cent of them had been engaged in this highly competitive commercial economic activity for less than five years. Elsewhere in Maharashtra the same kind of difficulty has surfaced, in the shape of lower caste farmers being driven to suicide due to crop losses resulting from inadequate technical knowledge about the growing of commercial crop[.]").
56. Id.
57. CEDAW, supra note 234, arts. 1-4. CEDAW forbids "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Id., art. 1. It further allows for "temporary special measures aimed at accelerating de facto equality between men and women." Id., art. 4.

1. Investigation and reviewing of the economic policies that were adopted to globalize the economy and introduce trade liberalization, including the corporatization of agriculture, on cotton farmers and other cash crop farmers. [58]

2. Address the recommendations of the officially constituted National Commission on Farmers and place an Action Taken Report on these recommendations.

3. Take steps, in line with both of the recommendations above, to revitalize the agricultural sector in a manner that puts farmers' human rights at the centre of government policies and programming, including, but not limited to:

3.1. Ensuring greater access to official credit in rural areas and facilitating expanded access to credit for all populations, including women and other marginalized farmers .[59]

3.2. Evolving just and equitable mechanisms to ensure farmers' access to water, including irrigation water .[60]

3.3. Implementing public provisioning of affordable inputs, such as seeds, pesticides, and fertilizer; facilitating the availability of traditional seeds through community-managed "Seed Villages"; and improving farmer yields by setting up "Seed Technology Training Centres . [61]

3.4. The national government should work with state governments to: develop uniform methodologies for monitoring farmer economics, health, and suicide rates in order to provide complete data on agrarian conditions; and ensure that relevant suicides are not being excluded because of restrictive definitions of who is and is not a farmer.

3.5. Statistics should include data on farmers who may not have title to their land, including women, *Dalit* and *Adivasi* farmers, or tenant farmers.

3.6. Statistics also should include data on land-holding size, seed usage, agricultural input (fertilizer and pesticides, etc.) usage, and the farmers' economic situation.

3.7. Ensure that funds from compensa-

58. Id.

59. As a State Party to multiple international human rights treaties, India must fulfill its obligations under these treaties. Alternative obligations are not an excuse for non-performance of human rights obligations. See generally Smita Narula, The Right to Food: Holding Global Actors Accountable Under International Law, 44 COLUM. J. OF TRANSNAT'L L. 641, 742 (2006) ("Member states [of international financial institutions] do not leave their human rights obligations at the door when entering these corridors of power.").

60. The National Commission on Farmers was convened by the Indian government in 2004 and was led by M.S. Swaminathan. Sharad Joshi, National Commission on Farmers, at last, THE HINDU, Mar. 3, 2004, available at http://www.thehindubusinessline.in/2004/03/03/stories/2004030300160800.htm. The Commission presented recommendations to Union Agriculture Minister Sharad Pawar in 2006. Swaminathan Commission calls for farmers' policy, THE HINDU, Apr. 14, 2006, available at http://www.hindu.com/2006/04/14/stories/2006041410371700.htm. To date, it appears that there has been no attempt to implement the recommendations contained in the Commission's report, nor does it appear that the Indian government has officially published the full report. The government has also not tabled an "Action Taken Report" with regard to the Commission's recommendations, which it is required to do. A version of the recommendations is available as a synopsis. See GOV. OF INDIA, MINISTRY OF AGRIC., NAT'L COMM'N ON FARMERS (NCF), SYNOPSIS OF NCF REPORT (Oct. 2006), available at http://www.indianfarmers.org/publication_books/Synopsis%20of%20NCF%20Report.pdf. A more complete version of the fifth and final report is also available. See NCF, SERVING FARMERS AND SAVING FARMING (Oct. 2006), available at http://krishakayog.gov.in/revdraft.pdf.

61. Id. at 24-25.

tion schemes designed to assist family survivors of suicide victims are sufficient, reach all affected families, and are distributed in a timely and thorough manner.

3.8. Ensure access in rural communities to proper health care services, including counselling services. These services should be attentive to the unique needs of small-scale farmers and family survivors of suicide victims.

4. Implement and enforce laws that appropriately regulate multinational and domestic agribusiness firms. The GI-crop regulating authorities must exercise due diligence in giving approval to the trials and cultivation of GM crop varieties. Regulations should address the human rights impacts of agribusiness firms on smallholder farmers and should require that all instructions and warnings related to special conditions required by the seed be fully explained and understood by purchasing farmers.

In addition to the responsibility of the government, at state and centre level, multinational agribusinesses also need to ensure the following:

1. Respect human rights by ensuring that the products and services they provide do not infringe on the human rights of Indian farmers .[62]
2. Exercise due diligence by continually assessing and monitoring the human rights impacts of their products and services .[63]
3. Take steps to address situations where human rights impacts are discovered, including by revising their practices to take account of the human rights of Indian farmers .[64]

Thus, the Indian government must put in place a stronger regulatory framework before more varieties are approved in order to ensure that farmers' rights are protected. It is neither inevitable, nor lawful, that the conditions that have led to this wave of suicides should continue. The Indian government should act now to implement the recommendations outlined above in order to put an end to this unnecessary tragedy.

62. Id. at 6-8.
63. Peoples Forum for UPR in India, India: Stakeholders Report Under the UPR 3 (2007), available at http://www.achrweb.org/UN/HRC/UPR-India.pdf ("The denial and deprivation of the economic, social and cultural rights also led to violations right to life through suicide, hunger and starvation. A staggering 89,362 farmers committed suicide between 1997 and 2005. Since 2002, there has become one suicide every 30 minutes.").
64. Navdanya, Social Human Rights in India 1 (2008), available at http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/GMOsIndia40.doc.
65. Id.

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DISPOSING IPR DISPUTE IN DEVELOPING COUNTRIES PARTICULARLY INDIA: A Way Forward

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ABSTRACT

The Developing countries face problem in resolving disputes relating to Intellectual Property Rights(IPR) due to lack of expertise and infrastructure, consequently creating hindrance in domestic and international trade, also the discrepancy in efficiency to dispose the IPR disputes as compared to their developed counterparts adds up to the problem .This paper is an attempt to identify the causes and the loopholes in law that leads to the existing challenges and it's implication on the International Trade. Another pivotal issue addressed by the author is the unsatisfactory work of the enforcement agency in the developing countries and subsequently the steps that can be taken for capacity building and accountability of such agencies. It will also examine the feasibility of separate commercial courts and ADR mechanism particularly dedicated to the IP issues, in the developing countries particularly in Indian Legal System. The mode of research is doctrinal however the research will triangulate over the qualitative as well as quantitative analysis of the available empirical data.

KeyWords: Alternative Dispute Resolution (ADR), Arbitration, Intellectual Property, International Trade.

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INTRODUCTION

The 21st century is the time for free market economy to finally find its place. Trade barriers of the world are being taken down one by one, and survival in the market depends upon who has the best product, or who offers the best services, in terms of characteristics, end use or financial viability. In this scenario, the most important role is being played by intellectual property rights.

Intellectual property system is usually seen as a tool which intends not just to stimulate creative work and technological innovation but also to protect transfer and dissemination of technology and promote benefit-sharing, economic, social and cultural progress.[1] Thus, Disputes in the area of intellectual property

1. Taubman, Antony, Wager Hannu and Watal, Jayashree, 'A Handbook on the WTO TRIPS Agreement' Cambridge University Press (2012), 2-3.

often exceed mere parties' competing legal claims and involve issues other than legal norms. In this regard, indigenous peoples have unique needs and expectations in relation to intellectual property. It is not strange that a privately controlled dispute resolution procedure, commonly known as an alternative to court litigation, has quickly become a popular means of dispute resolution among business-oriented entities. Alternative dispute resolution (ADR) enables parties to choose a forum for their dispute, arrange a procedure and create the applicable law, providing them with confidentiality and a prompt outcome. In many situations, however, it could happen that such strict party autonomy and promptness affect rights of other stakeholders, who have their interest in the dispute settlement, but are completely excluded from proceedings.

The number of international intellectual property disputes has increased rapidly in recent years.[2] Patent disputes are usually cross-border and thus involve multiple nations.[3] Domestic patent litigation is exhausting, [4] and international patent disputes add to this burden. What is more, the current methods to protect and enforce patent rights have been insufficient in the United States and many other countries. [5]The commercial value of a business is increased substantially by intellectual property assets, especially patents. [6] Patent disputes can be a life or death matters for an enterprise, which means that regardless of wins or loses, patent disputes are vital.

Increasing international trade and investment is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. With an influx of foreign investments, overseas commercial transactions, and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising. This has drawn tremendous focus from the international community on India's international arbitration regime.

Due to certain controversial decisions by the Indian judiciary in the last decade, particularly in cases involving a foreign party, the international community has kept a close watch on the development of arbitration laws in India. The Indian judiciary has often been criticized for its interference in international arbitrations and extra territorial application of domestic laws to foreign seated arbitrations. However, the latest developments in the arbitration jurisprudence through recent court decisions clearly reflect the support of the judiciary in enabling India to adopt international best practices. Courts have adopted a pro-arbitration approach and a series of pro-arbitration rulings by

2. Marshall A. Leaffer, Protecting United States Intellectual Property Abroad: Toward a New Multilateralism, 76 IOWA L. REV. 273, 280 (1991).
3. Bryan Niblett, Arbitrating the Creative, 50 DISP. RESOL. J. 64, 66 (1995).
4. See Murray Lee Eiland, The Institutional Role in Arbitrating Patent Disputes, 9 PEPP. DISP.RESOL. L.J. 283, 283 (2009).
5. Michael L. Doane, TRIPS and International Intellectual Property Protection in an Age of Advancing Technology, 9 AM. U. J. INT'L L. & POL'Y 465, 466 (1994).
6. Robert Pitkethly, The Valuation of Patents: A Review of Patent Valuation Methods with Consideration of Option Based Methods and the Potential for Future Research 1 (Judge Inst. of Mgmt Studies, Working Paper No. WP 21/97, 1997). (retrieved on 1 Dec 2016).

the Supreme Court of India ("Supreme Court") and High Courts have attempted to change the arbitration landscape completely in India. From 2012 to 2015, the Supreme Court delivered various landmark rulings taking a much needed pro-arbitration approach such as declaring the Indian arbitration law to be seat-centric; removing the Indian judiciary's power to interfere with arbitrations seated outside India; referring non-signatories to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy in foreign-seated arbitration; and determining that even fraud is arbitral in nature.

II. ADR AS IP DISPUTES RESOLUTION MECHANISM: PROBLEMS & ADVANTAGES

Technology-related litigation can be very expensive and time consuming. According to a survey, the average US patent infringement case costs more than a million. The high costs are generally due to the immense amount of discovery, expert testimony, and legal fees. In litigation, as Abraham Lincoln said: "The nominal winner is often a real loser in fees, expenses, and waste of time." Prolonged proceedings are especially harmful in patent cases because patent rights are time-sensitive and modern technology advances very quickly. Being caught up in litigation over patents can halt a company's development and business strategies with respect to the involved technology. The parties are faced with difficult business decisions, which are complicated by the unpredictability of the litigation outcome. For example, a company's on-going business can be hurt if it is uncertain about the patent rights of one of its products and decides to reduce or eliminate production until the dispute is decided.

Arbitration and Intellectual Property Disputes

Some commentators have suggested that high and increasing costs of patent litigation could be reduced by having those disputes resolved by expert arbitrators. For example, Kingston (1995) states "An important reason why intellectual property (IP) is far less effective for generating innovation than it could be is the excessively high cost of resolving disputes. This largely reflects the use of ordinary court arrangements to determine what essentially technical issues are." [7] Kingston also notes that in addition to the measurable costs of litigation, there also may be substantial unmeasured costs that take the form of "distraction, diversion of energy and misdirection of creativity that litigation imposes on innovatory firms." [8] Kingston proposed mandatory arbitration of patent disputes along with legal aid to the party that does not appeal the ruling to the courts. Kilb (1993) also recommended arbitration as a "quick, efficient form of patent dispute resolution" adding that "An arbitration hearing before experts in the field allows the parties to avoid lengthy litigation that could leave the disputed patent out-dated before it reaches its potential." [9]

7. Kingston, William, "Reducing the Cost of Resolving Intellectual Property Disputes," *European Journal of Law and Economics*, 1995, vol. 2, p. 85.
8. Ibid.
9. Kilb, Karl P., "Arbitration of Patent Disputes: An Important Option in the Age of Information Technology, Fordham Intellectual Property, *Media and Entertainment Journal*, vol. 4, no. 2, 1993, p. 609.

The long duration and high cost of patent litigation is primarily due to the prolonged period of discovery to address difficult technical issues and the costs of educating tiers of facts sufficiently to understand the case, including costs of counsel and technical and financial experts. [10] In principle, an arbitrator may be chosen who is already familiar with patent law and the technology associated with the particular patent(s) at issue, thereby eliminating significant costs. The expert arbitrator could dispense with much of the discovery process and decide the case more quickly and inexpensively. Proponents of arbitration also say that the arbitration process, unlike a public trial, is confidential and better protects trade secrets and other sensitive information that might be revealed in the course of litigation. [11] It is also claimed that with arbitration there is more certainty about the timing of final judgment and that arbitration and other forms of mediation are less adversarial than litigation and offer better prospects for maintaining a potentially valuable business relationship between the opposing parties. [12]

Advantages of ADR in Intellectual Property Disputes Party Autonomy

Intellectual property disputes have distinctive characteristics: they often span multiple jurisdictions and involve highly technical matters, complex laws and sensitive information. Naturally, parties will want a dispute resolution process that can be tailored to address these distinctive characteristics. However, litigation can be a highly inflexible mechanism that is constrained by complex laws, and parties rarely have the discretion to adapt the process to their dispute. [13] In contrast, ADR gives parties the freedom to customize their dispute resolution process in a single forum. [14] Parties can choose the ADR process best suited to their dispute: mediation, arbitration and expert determination are all possible options. [15] Parties can agree to meet at a neutral location, submit to a neutral expert of their choosing, and abide by rules and procedures that they have modified to meet their needs. [16] Some ADR processes, such as mediation, even allow parties to craft outcomes that address their specific interests. [17] Party autonomy is the guiding

10. Lim, Marion M., "ADR of Patent Disputes: A Customized Prescription, Not an Over-The-Counter Remedy," *Cordozo Journal of Conflict Resolution*, 2005, vol. 6, p. 169.
11. Casey, Kevin R., "Alternative Dispute Resolution and Patent Law," *Federal Circuit Bar Journal,* Spring 1993, vol. 3, no. 1, p. 4.
12. Ibid.
13. Veronique Bardach, 'A Proposal for the Entertainment Industry: The Use of Mediation as an Alternative to More Common Forms of Dispute Resolution' (1993) 13 Loy LA Ent LJ 477, 479 .
14. Ignacio de Castro and Panagiotis Chalkias, 'Mediation and Arbitration of Intellectual Property and Technology Disputes: The Operation of the World Intellectual Property Organization Arbitration and Mediation Center' (2012) 24 SAcLJ 1059, 1073.
15. Ignacio de Castro and Panagiotis Chalkias, ibid., 1061.
16. Trevor Cook and Alejandro I Garcia, International Intellectual Property Arbitration (Kluwer Law International 2010) 27.
17. David Allan Bernstein, The Case for Mediating Trademark Disputes in the Age of Expanding Brands (2005) 7 Cardozo J Conflict Resol 139, 159 – 160.

principle of ADR, and is manifested in its many advantages. [18]

Single Process, Jurisdictional Neutrality

As intellectual property rights are territorial in nature, they can simultaneously exist as separate pieces of property under distinct domestic laws in multiple jurisdictions, despite the operation of international treaties [19] that harmonize the subsistence or registration of intellectual property rights, such as copyright, trademarks and patents across signatory countries. The rise in cross-border trade and the international exploitation of intellectual property mean that disputes involving intellectual property are likely to impact across multiple jurisdictions. [20]

In the litigation of intellectual property disputes involving multiple jurisdictions, parties might be compelled to take out separate proceedings in those jurisdictions to address or enforce intellectual property rights existing under each of them. [21] As a result, such proceedings may be potentially subject to complex conflict of laws considerations. In contrast, ADR allows multiple issues and rights arising under different jurisdictions to be addressed in a single process, such as arbitration and mediation, which leads to a binding award or settlement. [22] ADR is also useful when multiple court actions are litigated in the same country. [23]

Parties in cross-border disputes also value jurisdictional neutrality; neither is likely to want the dispute tried in the opposing party's country. [24] ADR processes enable such jurisdictional neutrality over domestic courts because they provide a neutral forum for dispute resolution. Parties can choose an ADR neutral who is not based in the same jurisdiction as the parties, use neutral law to govern the dispute, and agree on a neutral location. [25] ADR rules, such as those established by the WIPO Center, are also neutral to the law, language and culture of the parties. [26] Jurisdictional neutrality gives ADR processes a clear advantage over litigation for cross-border intellectual property disputes.

Independent Specialized Expertise

Intellectual property disputes can involve highly technical scientific matters and

18. Trevor Cook and Alejandro I Garcia, ibid., 27; Alan Redfern, M Hunter *et. al*., Law and Practice of International Commercial Arbitration (4th ed, Sweet & Maxwell 2004) para 6 – 03.
19. World Intellectual Property Organization, 'WIPO-Administered Treaties' (World Intellectual Property Organization) http://www.wipo.int/treaties/en/> accessed December 2, 2016.
20. Julia A Martin, 'Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution' (1997) 49 Stan L Rev 917, 930.
21. **Voda v Cordis Corp**., No. 05-1238 (Fed. Cir., Feb. 1, 2007).
22. Susan Corbett, 'Mediation of Intellectual Property Disputes: A Critical Analysis' (2011) 17 New Zealand Business Law Quarterly 51, 63.
23. Susan Blake, Julie Browne and Stuart Sime, A Practical Approach to Alternative Dispute Resolution (Oxford University Press 2012) 18.76.
24. Trevor Cook and Alejandro I Garcia, International Intellectual Property Arbitration (Kluwer Law International 2010) 27.
25. Trevor Cook and Alejandro I Garcia, ibid., 29.
26. Julia A Martin, 'Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution' (1997) 49 Stan L Rev 917, 932.

complex legal issues, [27] but not every country has specialized intellectual property courts or judges. [28] Thus, when judges and juries lack the necessary expertise to fully comprehend the complex factual, technical and legal issues at stake, considerable time and resources may be required to present the relevant technologies and laws to them. [29]

ADR processes allow parties to choose a neutral with specialized expertise to act as a decision-maker, or a facilitator. [30] Experts in law, technology or specific industries can be appointed as neutrals; parties also have the ability to appoint a panel of experts with expertise in different areas of the dispute. Expert neutrals can use their knowledge and experience to provide guidance during the ADR process, and to craft a satisfying resolution for the dispute. When capable experts are appointed, ADR processes offer benefits that would be otherwise unavailable through litigation. [31]

Simplicity; Flexibility

ADR processes are procedurally simple and flexible when compared to litigation. ADR gives parties the freedom to agree on the conduct of the proceedings, and select appropriate procedural rules. [32] For example, parties can place limits on the amount of survey evidence admitted for trademark disputes, [33] and even choose the extent to which certain rules of evidence are to apply, if at all. [34]

Furthermore, ADR processes can provide a straightforward mechanism for resolving legally complex intellectual property disputes. For example, mediation focuses on the parties' motivations and interests, not necessarily their strict legal positions. This helps the parties concentrate on their shared interests instead of legal rights and wrongs, which facilitates the creation of a satisfying settlement. [35] While this approach does not eliminate the legal complexities of the dispute, a mediator with the relevant legal and/or subject matter expertise and experience can provide appropriate assistance and support.

Cost Savings

Intellectual property litigation can be an expensive affair, especially if appeals and foreign litigation are involved. The prohibitive cost of legal proceedings in some jurisdictions can make it difficult for individuals or small businesses to enforce their rights, or defend themselves in intellectual

27. David Allan Bernstein, The Case for Mediating Trademark Disputes in the Age of Expanding Brands (2005) 7 Cardozo J Conflict Resol 139, 154–155.
28. The Intellectual International Property Institute and the United States Patent and Trademark Office, 'Study on Specialized Intellectual Property Courts' (International Intellectual Property Institute, January 25, 2012) <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf> accessed December 6, 2016.
29. Sarah Tran, 'Experienced Intellectual Property Mediators; Increasingly Attractive in Times of "Patent" Unpredictability' (2008) 13 Harv Negotiation L Rev 314, 316.
30. Supra note 22.
31. Ibid 30-31.
32. Supra note 28, p. 156.
33. Ibid.
34. Scott H Blackman and Rebecca McNeill, 'Alternative Dispute Resolution in Commercial Intellectual Property Disputes' (1998) 47 Am U L Rev 1709, 1713.
35. Mary Vitoria, 'Mediation of Intellectual Property Disputes' (1998) 1 JIPLP 398.

property claims by or against larger entities.

In comparison to litigation, ADR offers an affordable and accessible avenue for parties to resolve their disputes. The many advantages of ADR provide significant cost savings, because parties can avoid expensive litigation at home and abroad, use expert neutrals that can delve straight into complex intellectual property issues, and dispense with complicated and formalistic procedures. The time savings provided by ADR naturally translate into cost savings as well. [36]

Confidentiality

Confidentiality is often of critical importance in intellectual property disputes. Thus, parties may balk at court proceedings when trade secrets or proprietary information, such as experimental results from research and development, are involved. [37] Litigation and the discovery process can force the public disclosure of such sensitive information, [38] which can irreversibly damage the parties' business prospects. [39]

Confidentiality is a key advantage of ADR because it allows the parties to effectively control disclosures and access to sensitive information. [40] Proprietary information can be kept confidential through agreements between the parties, [41] and arbitrators can issue protective orders to prevent parties from accessing confidential documents. [42] Furthermore, unlike litigation, the entire ADR process and its outcome can be kept confidential, which can be advantageous for parties who wish to preserve their business reputations and relationships. [43]

Diverse Solutions

Litigation normally offers parties a limited range of specific legal remedies. While parties can apply for monetary damages, injunctions, specific performance and other such remedies, such solutions tend to be "win-or-lose" and granted based on considerations of strict legal merits or otherwise at the court's discretion. Parties do not have the discretion to craft their own solutions, or instruct the court to deliver its decision within specified parameters. [44]

36. Jesse S Bennett, 'Saving Time and Money By Using Alternative Dispute Resolution For Intellectual Property Disputes – WIPO to the Rescue' (2010) 79 Revista Juridica UPR 289, 396 – 398.
37. Jesse S Bennett, 'Saving Time and Money By Using Alternative Dispute Resolution For Intellectual Property Disputes – WIPO to the Rescue' (2010) 79 Revista Juridica UPR 289, 396.
38. Jennifer Mills 'Alternative Dispute Resolution in International Intellectual Property Disputes' (1996) 11 Ohio St J on Disp Resol 227, 231.
39. Susan Corbett, 'Mediation of Intellectual Property Disputes: A Critical Analysis' (2011) 17 New Zealand Business Law Quarterly 51, 62.
40. Trevor Cook and Alejandro I Garcia, International Intellectual Property Arbitration (Kluwer Law International 2010) 47.
41. Jesse S Bennett, ibid., 396.
42. In an expedited arbitration administered by the WIPO Center, the arbitrator issued a protective order pursuant to the WIPO Expedited Arbitration Rules to prevent the claimant from accessing certain confidential documents disclosing the respondent's business secrets. See Ignacio de Castro and Panagiotis Chalkias, 'Mediation and Arbitration of Intellectual Property and Technology Disputes: The Operation of the World Intellectual Property Organization Arbitration and Mediation Center' (2012) 24 SAcLJ 1059, 1069 – 1070.
43. Susan Corbett, ibid., 65.
44. David Allan Bernstein, The Case for Mediating Trademark Disputes in the Age of Expanding Brands (2005) 7 Cardozo J Conflict Resol 139, 149.

Mediation gives parties the opportunity to negotiate win-win or other creative solutions that satisfy their interests. [45] For example, parties can agree to share the intellectual property rights in dispute through licenses or consent to use agreements, or indeed address or determine non-intellectual property issues in the resolution of an intellectual property dispute. Such mutually beneficial outcomes allow parties to preserve existing business relationships, or forge new ones. [46]

In arbitration, the substance of the arbitral award is determined by the arbitral tribunal. However, parties can agree on the scope and limits of the arbitration. For example, parties can agree to establish limits to the quantum of the award, [47] and even specify in the arbitration agreement, a desired time frame by the arbitral tribunal to issue the arbitral award. Beyond a final award, [48] parties can petition the arbitral tribunal for interim relief in the form of an injunction, or security for costs. [49]

III. CONCLUDING OBSERVATIONS

The development of an international legal instrument, which would strengthen international public policy on the protection of indigenous Traditional Knowledge, Traditional Cultural Experiences and Genetic Resources, remains a matter of the utmost importance. An appropriate ADR mechanism is a complementary tool, which could enhance the applicability and efficiency of such an instrument.

Various researchers have given suggestions to remodel the IP regime in India to make it compliant with the international norms and in pace with the demands of the global standards of economic, trade and regulatory policies. This researcher has also gone down the same path trodden by more illustrious peers in a humble attempt to suggest a few changes.

The most important aspect is the changes required in the legislation relating to in-

45. Sarah Tran, 'Experienced Intellectual Property Mediators; Increasingly Attractive in Times of "Patent" Unpredictability' (2008) 13 Harv Negotiation L Rev 314, 323.
46. Supra note 48, p. 159.
47. This is a form of arbitration known as "high-low" or "bracketed" arbitration. It is commonly used when only the quantum of compensation, and not liability, is an issue. If the award falls within the agreed range, the parties are bound by the award. If the award is lower than the agreed minimum amount, then the defendant will pay the agreed minimum, and if the award is higher than the agreed maximum, the defendant will only pay the agreed maximum. The arbitral tribunal will conduct the arbitration without knowing the limits of the agreed range. See John W Cooley and Steven Lubet, Arbitration Advocacy (National Institute for Trial Advocacy 2003) 250.
48. Julia A Martin, 'Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution' (1997) 49 Stan L Rev 917, 928; but see Alan Redfern, M Hunter et. al., Law and Practice of International Commercial Arbitration (4th ed, Sweet & Maxwell 2004) para 8-68.
49. It should be noted that whether the parties should submit an application for interim relief to the arbitral tribunal or a competent judicial authority will depend on the nature of the dispute. The WIPO Arbitration and Expedited Arbitration Rules allow the arbitral tribunal to issue a wide range of interim measures, including injunctions in cases of unfair competition, or in connection with alleged infringements of intellectual property rights. See Ignacio de Castro and Panagiotis Chalkias, 'Mediation and Arbitration of Intellectual Property and Technology Disputes: The Operation of the World Intellectual Property Organization Arbitration and Mediation Center' (2012) 24 SAcLJ 1059, 1071.

tellectual property rights, and the need to make a strong base to cater to the global competitiveness. Focus must be done on protection and implementation of IP in India. One of the major changes needed is in the time period in which the IPR protection is granted and the need to reduce it to an eighteen-month period from the date of filing of application. Another area of focus is the need for enforcement mechanism that can deliver speedy redressal in case of infringement, as opposed to the time-consuming mechanism in place today. There is a need to incorporate ADR methods as mandatory first step for resolving disputes, before commercial courts get involved.

An important aspect, especially for developing countries like India is IPR generation. It is said that the next Silicon Valley is in India. The huge innovative and educated human resource of India is rapidly churning out more and more entrepreneurs. There is a specific need to ensure that their innovation is protected through proprietary rights under the IPR regime.

Arbitration of patent validity and infringement issues in many major technology-producing countries is impeded by a lack of uniformity and various practical barriers. These barriers are apparently not sufficient to eliminate the arbitration of patent issues where strong incentives exist to do so, but do appear to be sufficient to keep the practice from becoming a mainstream alternative to normal civil litigation. Even in countries where no explicit legal barriers are present, practitioners have been slow to adopt arbitration as an alternative to civil court litigation in patent disputes. There are public interests at stake in any dispute revolving around patent validity, and these interests may not be effectively represented in arbitration. We believe, however, that such concerns do not justify the restrictions on objective arbitrability found under some statutory regimes. Instead, these concerns can be satisfied by a coordinated system of interrelated rules regarding objective arbitrability, the effect of arbitration judgments, confidentiality, choice of law, and remedies. Such a system would ensure that public interests are protected by limiting the self-serving options of parties arbitrating issues of patent validity or infringement.

Another important aspect of the same is intellectual IP awareness. The people of the country must be made aware of various intellectual properties and the need to respect the Intellectual Property Rights of people. [50] There is a need to focus on rural populace of India and educate them about the IPRs. The same can be achieved by making IPR education a part of school curriculum and educate the people at a grass root level. Also, special IPR classes need to be given to judges dealing with these cases, the foreign models can only be indicative of solutions, the real solution lies in integration of indigenous and circumstances specific model with uniform law across nations. The success of Na-

50. A web solutions company in a remote location has the name of "Applebite" and displays the same prominently in front of its office along with the logo of the Apple Inc. this is not only an infringement of Apple Inc.' trademark, but is also deceptive towards the consumers. This is one of the numerous instances where the intellectual property rights of renowned company are misappropriated by small scale shops of service providers.

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tional Green Tribunal is a clear indication of the feasibility of exclusive courts for IP Laws. Additionally, there must be an added focus on human capital development, which would strengthen innovation in the industry, which would increase IPR generation.

The above-mentioned changes can help in ensuring that India becomes a leader in innovation, churning out the best product and services for the world to consume. This would ensure that India finds its rightful place as one of the global leaders in the 21st century.

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A BRIEF STUDY ON CASTEISM : Dr. Ambedkar

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ABSTRACT

Dr. Ambedkar is renowned as a political leader, as a great jurist and as one of the framers of the Indian Constitution. But above all he is remembered for his unrelenting fight to abolish Untouchability. He was the social prophet of the Untouchables. He was one of the greatest sons of India who sacrificed his life for the emancipation of the exploited sections of the society. He was legal luminary of high order who played a remarkable role as the guiding genius in drafting of the Constitution of India. The present generation should emulate the rare and rich qualities the great patriot and reformer.

Key Words : Caste System, Casteism, Social justice, Reservation, Economic Structure.

PAGE : 7 REFERENCES : 18

INTRODUCTION

Dr. Ambedkar is renowned as a political leader, as a great jurist and as one of the framers of the Indian Constitution. But above all he is remembered for his unrelenting fight to abolish Untouchability. He was the social prophet of the Untouchables. He was one of the greatest sons of India who sacrificed his life for the emancipation of the exploited sections of the society. He was legal luminary of high order who played a remarkable role as the guiding genius in drafting of the Constitution of India. The present generation should emulate the rare and rich qualities the great patriot and reformer.

CASTEISM

The Caste system is a complicated one, both theoretically and practically. Practically, it is an institution that portends tremendous consequences for all concerned. It is a national problem capable of wide social tension; for a long as Caste in India does exist, the Hindus will hardly intermarry or have any social intercourse with outsiders; and if Caste-minded Hindus migrate to other regions on the earth, the Indian Case would become a world problem. Theoretically, many scholars have endeavored to investigate its courses. Let us see some of them.

1. M. Senart, a French authority, defines a Caste as "a close corporation, in theory, at any rate, rigorously hereditary, equipped with a certain traditional and independent organization, including a chief and a council, meeting on occasions in assemblies of more or less plenary authority and joining together at certain festivals; bound together by common occupations, which relate more particularly to marriage and to food and to questions of ceremonial pollution. Such a corporation, according to him, is restricted to the exercise of Jurisdiction to its members, the extent of which varies, but which succeeds in making the authority of the community more felt by the sanction of certain penalties and, above all, by final irrevocable expulsion from the group".
2. According to Sir H. Risley, "a Caste may be defined as a collection of families or groups of families bearing a common name, which usually denotes or is associated with specific occupations, claiming common descent from a mythical ancestor human or divine, professing to follow the same professional callings and are regarded by those who are competent to give an opinion as forming a single homogeneous community".
3. Mr. Nesfield defines a Caste as "a class of the community, which disowns any connection with any other class and can neither inter-marry nor eat, nor drink with any but persons of its own community". According to him, the absence of interlining is the cause of Caste.
4. Dr. Ketkar[1], an Indian authority, defines Caste as "a social group having two characteristics; (i) the membership is confined to those who are born of members and includes all persons so born; and (ii) the members are forbidden by an inexorable social law to marry outside the group".[2]

Dr. Ambedkar says that these scholars, if taken individually, may be said to include in their definitions of Caste too much or too little. Neither definition can be said to be complete or correct. They have almost missed the central point in the mechanism of the Caste system. They have been mistaken in defining the nature of Caste as an isolated unit by itself, and not a s group within the system, and with definite relations fl the Caste system as a whole. Yet collectively, all of their views are complementary to one another, each one emphasizing what has been obscured in the other. Dr. Ambedkar endeavors to examine, by way of criticism, only those points common to all in each of the above definitions, which are regarded as peculiarities of Caste.[3]

To start with Senart, he associates Caste with the idea of pollutions. The learned Doctor observes that the idea of pollution has little to do with the origin of Caste; for this idea is related to only the priestly class which along has a particular 'notion of purity and impurity'. It is a factor but not the essence of Caste.[4] Nesfield has mistaken the idea of messing and thinking that is absence is the cause of Caste. This author has put the cart before the horse, i.e., the

1. Ketkar, S.V., History of Caste in India (ed. 1st, 1984, Jaipur) p. 4; Quoted by Dr. Ambedkar in his paper, Castes in India: Their Genesis, Mechanism and Development (1916) p.3.
2. All these authors have been quoted by Dr. Ambedkar in his, Castes in India (1916) Para 6-9. It is only a paper read by him before the Anthropology Seminar (19th May, 1916) of Dr. A.A. Golden wiser, Columbia University, U.S.A. Only the title Castes in India, will indicate the reference to it.
3. Castes in India, p.10.

effect of the cause. Dr. Ambedkar hoi that the absence of a general messing system is a natural result of Caste mechanism,' that is, exclusiveness, but not the cause of it. Sir Risley, according to him, makes no new point. His definition deserves n special attention.5 Though Dr. Ketkar seems to exhibit the real spirit of Caste mechanism, viz., the members are forbidden by an inexorable law to marry outside the group, yet as Dr. Ambedkar observes, he has m made his point clear by means of illustration. In his definition, there is slight confusion of thought, lucid and definite as other wise it is. He speaks of prohibition of inter-marriage and of membership by the rule o endogamy as the two characteristics of Caste. Dr. Ambedkar says that these two aspects are one and the same tiling and not two different things, as Dr. Ketkar supposes them to be. If inter-marriage' is prohibited, naturally the result would be to limit membership to those born within the group. The two aspects are the 'obverse' and 'reverse' of the same coin.[6]

5. As for Dr. Ambedkar, endogamy or the absence of inter-marriage, is the only trait that can be called the essence of the Caste system.

He observes that no civilized society of the world, in modern times, inherits more survivals of primitive nature that Indian society. For it operates, in all its aspects, as a rigorous tribal code. Other societies do not have hard and fast rules regarding the marriage system. But in Hindu Society, today, the rule of exogamy, for all practical purposes, seems to be a positive injection. In fact, the rule of endogamy, according to Dr. Ambedkar, is largely responsible for the Caste mechanism.[7]

It is since Manu, according to Dr. Ambedkar, that the marriage rules became more rigorous. Manu codified these rules, and he gave them a religious sanction, viz., to marry outside one's group, class or Varna, was a sin against the Divine will, for which, one would have to undergo many tortures, physically and mentally. The penalties were prescribed for those, who broke the rules of the code. This was in order to maintain the rule of endogamy or rather to preserve tribal culture and civilization, and thus, t adhere to group loyalty.[8]

Dr. Ambedkar, further, observes that it is very difficult to check the exogamous tendencies of the people. But the Hindu social laws had no mercy for a sinner, who had the courage to violate the sanctity of the Shastras. The penalty imposed upon the individual was excommunication from the main class. The excommunicated people, then, were liable to form a separate enclosed group with in the main class, in fact, this happened. No such enclosed group was allowed to have intercourse with the former class with the result that these people permanently, formed their own groups. In short, the greater the frequency of breaking the rule of endogamy, the larger the creation of new enclosed groups.[9]

4. Id. Para 11.
5. Ibid. Para 11
6. Id. Para 12
7. Id. Para 13
8. Id. Para 36
9. Id. Para 46

With the lapse of time, there was a further fragmentation of the enclosed groups; this led to the formation of wheels within wheels in Hindu society. Thus Caste, to Dr. Ambedkar, is "an artificial chopping off of the population into fixed and definite units, each one prevented from fusing into another group through the custom of endogamy.[10]

Dr. Ambedkar was Manu of the Indian Constitution. It would not be trite to say that he was deadly against Manu, who was a founder of hierarchical system of Hindu society on the basis of Caste. He was against the society based on Caste as it breeds inequality, produces strife and social instability. His views on abolition of Castes are still relevant in the present set-up of the society. He was a preacher of social democracy and believed that the political and economic democracy would be of no avail unless social inequalities are removed. He had been a staunch fighter of his community that is depressed community and in order to watch the interests of Untouchables, he criticizes the Congress and Gandhi and aligned so many times in his eventful career with British.[11]

"Dr. Ambedkar was of the view that the Caste system prevent common activity and by preventing it, it has prevented the Hindus from becoming a society within an unified life and consciousness of its own beings."[12] There is only individual share or part in the associated activity. According to his version, Hindu religion ceased to be a missionary religion when the Caste system grew up among the Hindu. Caste was inconsistent with conversion. He concluded "so long as Castes remain, Hindu religion cannot be made a missionary religion and "Shuddhi" will be both a foil and futility."[13]

According to him, Caste is not merely a division of labor, it is also a division of laborers. It is a hierarchy in which the division of laborers is graded one above the other. This division of labor was not spontaneous. It was not based on natural aptitudes nor on choice. Individual sentiments had no place in it. But the Caste system involves an attempt to appoint tasks to individuals in advance, selected not on the basis of trained origin capacities, but on that of the social status of the parents.[14] He was so pessimistic on Caste problems-that he remarked "Chaturvarnaya" must fail for the very reason for which Plato's Republic must fail and said;" To me this "Chaturvarnaya" with its old labels is utterly repellent and nr whole being rebels against it."[15]

There was no Caste system according to him before pre-Vedic period. He raised another question that why there is no social revolutions in India. The obvious answer he gave was that the lower classes of Hindus have been completely disabled for direct actions on account of this wretched "Chaturvarnayas" system. He further said

10. Id. Para 13
11. Mahajan, R.K., Dr. Ambedkar's views on Constitutional Vision; Caste System and Parliamentary Democracy, Dr. B.R. Ambedkar ; Social Justice and the Indian Constitution (edited by K.L. Bhatia, 1994, New Delhi) p. 137.
12. Kuber, W.M., Dr. Ambedkar: A critical Study (ed. 1st, 1979, New Delhi) p. 49. Y.
13. Supra, Note 11 at 138.
14. Supra, Note 12 at 51.
15. Supra, Note 13.

that the lower classes were condemned to be lowly and not knowing the way of escape and not having the means of escape they became reconciled to eternal servitude which they accepted as their inescapable fate. The weaknesses in them have had in their freedom of military service-their physical weapon, in suffrage their political weapon and in education – their physical weapon. All the three weapons were denied to the masses in India by Chaturvarnaya. He concluded "There cannot be a more degrading system of social organization than Chaturvarnaya. It is the system which deadens, paralyses and cripples the people from helpful activity."[16]

Dr. Ambedkar was the Chief Architect of the Constitution of India when it was in drafting stage. The Constitution of India aimed ensuring fundamental rights and human dignity to the citizens and non-citizens, the removal of disabilities to Untouchables. The Caste was based on secularism and at the same time the interest of minorities, religious freedom of every section of society irrespective of Caste or creed are social disabilities and were protected. Dr. Ambedkar fought against Untouchability and later, on it was adopted as once of the important items of manifesto of the Indian Congress Party and it formed its recognition in Indian Constitution that the Untouchability in any form in India is abolished and would be punishable in accordance with law.

Dr. Ambedkar fought for separate electorate for Scheduled Castes representation, but he failed and provision for reservation was made. He was of the view that communal majority would not look the interests of them. Dr. Ambedkar did not want permanent reservation to weaker sections of the society that is Scheduled Castes, but he wanted social mobility of the depressed classes and their absorption in the main steam of National Life. The tragedy of the time that the benefits have not gone to the deserving sections of the Scheduled Castes and it started concentrating in few families and imbalance was not removed and the dream of the architect of the Indian Constitution remained unfulfilled.[17]

The Father of the Indian Constitution issued directions in the Directive Principles to the political parties to distribute the justice to the deserving people and socio-economic efforts were made, benefits have been percolated no doubt to the weaker sections of the society not to the extent to which the Father of the Constitution of India thought. Hindu society is rigid, which experienced volcanic social change the Hindu Code was enacted despite opposition from conservative wings of religion. Dr. Ambedkar suggested intermarriages and inter-dining in the Caste and Government also encouraged it later on by way of special prizes who marry the Hindu Scheduled Castes or vice-versa. Society did not accept it as Caste system had not been diluted. Entry of temples, public places or resorts was made free and accessible to the Scheduled Castes. Education institutions raised their standard of living. People no more looked with contempt or hatred in villages also villagers are not hesitating in dining.[18]

Economic structure of India is such that parallel economy is operating. Unemployment is rampant. The status of the upper

16. Ibid.
17. Id. At 139.
18. Ibid

Castes on account of getting benefits by few families are same as of elite of other Castes. Despite reservation the problem stand where it is. Dr. Ambedkar was a great Constitutional prophet. He prophesised that permanent reservation is no solution and he wanted the abolition of Caste system.

Dr. Ambedkar on Social Justice

"The Love of Justice is, in most men,
Merely the fear of suffering injustice".

La Rochefoucould[19]

"Those who denounce injustice do so not because They are afraid of doing it but of suffering it."[20]

Before discussing the views of Dr. Ambedkar concerning social Justice for the depressed, under privileged and scorned, it may be worth recalling to knowing what social justice means. Social Justice is not only difficult but hard to define, because "Ever since men have begun to reflect upon their relations with each other and upon the vicissitudes of the human lot, they have been preoccupied with the meaning of justice."[21] It is the fact that man alone is the true subject and object of justice. "The worst and the most ignorant of men appeal to justice as the vindication of some of their most misguided actions."[22] Be that as it may, abominable injustices have been done in the name of justice, even as terrible oppressions have been done in the name of liberty, because when men sink to the lowest they clutch for excuse at the highest.[23]

Justice is a social virtue, and the term adequately conveys the simple idea that the virtue of justice arises out of, and expresses itself in, obligations towards others.[24] The purpose of justice as a social virtue is to maintain, or to restore, an equilibrium, or harmony in human affairs –the conception of harmony is a dominant theme in every aspect of justice and every treatment of it, ancient or modern,[25] justice as a moral principle none else was so forceful and persuasive in argument, clear and lucid in expression, quick and arresting in debate. And, yet he had always the generosity to concede the credit to a critic who made a valid point and to frankly acknowledge it. Dr. Ambedkars contribution to the Constitutions is undoubtedly of the highest order. Indeed, he was 'Modern Manu' and deserved to be called the Father or the chief Architect of the Constitution of India".365 S. Sahaya said, "The achievement of independence would go to the credit of Mahatmaji and its codification to one of Mahatmaji's worst critics, viz., the Great Architect of our Great Constitution, Dr. Ambedkar", He said further, "He deserves the gratitude not only of this Assembly, but of this nation.... And his masterly way of piloting, will ever be remembered not only by this generation, but by the posterity with gratitude"366

Alladi Krishnaswami Ayyar, a member of the Drafting Committee, concluded his speech by saying, "I would be failing in my duty if I do not express my high appreciation of the skill and ability with which my friend, the Hon. Dr. Ambedkar has piloted this Constitution and his untiring work as the Chairman" of the Drafting Committee367. Govind Ballabh Pant called him 'Pandit' saying that "his scholarship is evinced in preparing the Draft of the Constitution and in making a logical exposition of its provisions in this House"368. Dr. Pattabhi Sitaramayya said: "I should have liked to tell Dr. Ambedkar what a steam roller intellect he brought to bear upon this magnificent and tremendous tasks: irresistible,

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indomitable, unconquerable, leveling down tall palms and short poppies; whatever he felt to be right he stood by, regardless of consequences'369

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NET NEUTRALITY – Brief Diagnosis

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ABSTRACT

Net Neutrality can be simply called as 'Internet equality', 'Net Equality' or 'Internet Neutrality'. In common parlance, it is the principle that all data on net, websites and services should be equally treated by Internet Service Providers as well as government, without any kind of discrimination on the basis of user, website, content, application or communication mode. It is the idea that ISPs should not enter into any paid agreements with organizations like Netfix in order to mode their content faster than others. As debates, the absence of net neutrality will definitely benefit the telcos while at the same time harming the market by unleashing monopolistic tendencies. Net Neutrality raises a number of issues. The concept of internet neutrality and internet governance are inextricably linked and Internet governance includes social, economic and technical issues including affordability, reliability and quality of service. Thus, in order to arrive at proper norms of internet governance, it is essential to examine perspectives on net neutrality, particularly from the Indian perspective.

This paper briefly describes these issues especially legislation for internet neutrality in India with several considerations.

KeyWords: Net Neutrality, Internet Governance, Legislation for Internet Neutrality.

PAGE : 13 REFERENCES : 28

INTRODUCTION

The concept of **Internet Neutrality** or **Net Neutrality** was first put forward by Timothy Wu, then an associate professor at the University of Virginia Law School in 2002. The concept was put forward as a rule of non-discrimination, that barring a "show of harm", broadband operators or ISP should be restricted from interfering with the content of the network users.[1]

1. Tim Wu, A Proposal for Network Neutrality, available at http://www.timwu.org/OriginalNNProposal.pdf.

The fundamental question that comes up for consideration is what exactly net neutrality is. Net neutrality is a principle that is dedicated to making the Internet a neutral platform for the proliferation of all kinds of services offered by all stakeholders. Wikipedia defines, net neutrality as the principle that Internet service providers and governments should treat all data on the Internet equally, not discriminating or charging differentially by user, content, site, platform, application, type of attached equipment, or mode of communication.

The principle of net neutrality has already begun to engulf therein various complicated legal, policy and regulatory issues. The concept of internet neutrality and internet governance are inextricably linked and Internet governance includes social, economic and technical issues including affordability, reliability and quality of service. Thus, in order to arrive at proper norms of internet governance, it is essential to examine perspectives on net neutrality, particularly from the Indian perspective.

Net neutrality is a concept based on 2 non-discrimination principles -*first*, that Internet users should have access to all content on the internet, unregulated by any ISP and *second*, that a higher Quality of Service for a higher price be offered to users on "fair, reasonable and non-discriminatory" terms. [2]

WHAT WILL HAPPEN IF THERE IS NO NET NEUTRALITY?

If there is no net neutrality, ISPs will have the power and inclination to shape internet traffic so that they can derive extra benefit from it. For example, several ISPs believe that they should be allowed to charge companies for services like YouTube and Netflix because these services consume more bandwidth compared to a normal website. Basically, these ISPs want a share in the money that YouTube or Netflix make.

Without net neutrality, the internet as we know it will not exist. Instead of free access, there could be "package plans" for consumers. For example, if you pay Rs 500, you will only be able to access websites based in India. To access international websites, you may have to pay a more. Or maybe there can be different connection speed for different type of content, depending on how much you are paying for the service and what "add-on package" you have bought.

Lack of net neutrality, will also spell doom for innovation on the web. It is possible that ISPs will charge web companies to enable faster access to their websites. Those who don't pay may see that their websites will open slowly. This means bigger companies like Google will be able to pay more to make access to Youtube or Google Plus faster for web users but a startup that wants to create a different and better video hosting site may not be able to do that.

Instead of an open and free internet, without net neutrality we are likely to get a web that has silos in it and to enter each silo, you will have to pay some "tax" to ISPs.

2. Christopher T. Marsden, Network Neutrality and Internet Service Provider Liability Regulation: Are the Wise Monkeys of Cyberspace Becoming Stupid?, 2(1) GLOBAL POLICY 2 (2010).

NET NEUTRALITY- PRESENT STATUS:

On 27 March 2015, the Telecom Regulatory Authority of India (TRAI) put up on its website a consultation paper in a quiet unannounced manner. The said consultation paper is titled "Consultation Paper on Regulatory Framework for Over-the-top (OTT) services". The said consultation paper was drafted in a manner wherein lot of questions was sought to be asked from specific perspectives. The said paper has since now been known in the public domain as Net Neutrality Consultation Paper of TRAI.

The TRAI Consultation Paper on Regulatory Framework for Over-the-top (OTT) services including 'Net Neutrality' comes in India at the time when there have been some initial experiments among service providers towards feeling the turf in this direction.

INDIAN- LEGAL SCENARIO

Legally, the concept of net neutrality doesn't exist in India. TRAI, which regulates the telecom industry, has tried to come up with some rules regarding net neutrality several times. For example it invited comments on the concept of net neutrality from industry bodies and stakeholders in 2006. But no formal rules have been formed to uphold and enforce net neutrality.

The Information Technology Act does not provide regulatory provisions relating to Internet access, and does not expressly prohibit an ISP from controlling the Internet to suit their business interests. With the advent of 3G and the unprecedented growth of Internet users in India, the chances of networks getting clogged have become higher. In such circumstances, it is possible that an ISP may impose certain types of premium rent on download or surfing.

The entire issue of net neutrality has certainly become very important. When one looks at the existing laws in India, one finds that the issue of net neutrality has not been mentioned in the existing laws of India. India has place in its mother legislation being the Information Technology Act, 2000. The Information Technology Act, 2000 has been sought to be supplemented by means of various rules and regulations which the Government of India has promulgated from time to time. Neither the Information Technology Act, 2000 nor any rules and regulations made thereunder, have any reference to net neutrality.

INTERNET NEUTRALITY AND ISP LIABILITY IN INDIA

ISPs fall under the category of an Intermediary as given under Section 2(w) of the Information Technology Act, 2000 ("the IT Act"): *"intermediary", with respect to any particular electronic records means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, earth engines, online payment sites, online-auction sites, online market places and cyber cafes.*

Thus, ISPs clearly fall within the mandate of the IT Act, 2000, as well as the Information Technology (Intermediaries Guidelines) Rules, 2011.[3]

3. G.S.R. 314(E), New Delhi, the 11th April, 2011, Part II-Sec. 3(i), The Gazette of India: Extraordinary,

The IT Act seeks to affix liabilities upon intermediaries, the premise behind imposing liabilities on internet intermediaries being that they are seen to be in a position to better supervise Internet activities and prevent the commission of offences taking place over the inter webs. [4] However, this is not necessarily true of ISPs- since a massive amount of information is transmitted through the Internet, ISPs are hardly in the best position to weed out objectionable content. [5]

This logic is reflected in Section 79 of the IT Amendment Act, 2008, which lays down the cases in which no liability is affixed upon intermediaries. The section states that "an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him". However, the IT Act attaches some conditions to this, that is, the safety net is available only to those intermediaries who *either* only "provide access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted" [6], or where the intermediary does not "select or modify the information contained in the transmission". However, the *Act* also mandated that the intermediary observed "due diligence" while discharging his duties, and also stated that the safe harbor protection would be revoked if the intermediary had "conspired, abetted, aided or induced" the commission of an illegal act. [7]

Thus, till of late, ISPs had reason to actively monitor data to ensure that they exercising "due diligence" and not aiding or abetting any unlawful activity. It was only in 2011, when the Government notified the Information Technology (Intermediaries Guidelines) Rules, 2011 on the 11th of April 2011, in exercise of its powers under Section 79(2) read with Section 87(2)(zg) of the Act, that the principles of net neutrality were fully incorporated under the Act. Rule 3 of the IT Rules clarified the scope of the term "due diligence", and in clause 3 of the rule, specified that that due diligence meant that the "intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information" [8] . The proviso to Rule 3(3) also clarified that the "temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission

available at http://bsu.bih.nic.in/(S(qpg2x155q2hkemisojswvv45))/static/downloads/itact/it-intermediaries-guidelines-rules-2011.pdf, (last accessed Oct. 20, 2012). (Hereinafter, "the IT Rules").

4. Kahandawaarachchi Thilini, Liability of Internet Service Providers for Third Party Online Copyright Infringement: A Study of US and Indian Laws, 12 (6) JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2007) 553-561.

5. Mark A. Lemley, Rationalizing Internet Safe Harbours, 6 J. ON TELECOMM. & HIGH TECH L. 101, 102, available at http://jthtl.org/content/articles/V6I1/JTHTLv6i1_Lemley.PDF, (last accessed Oct. 20, 2012).

6. IT AMENDMENT ACT, s. 79(2)(a).

7. IT AMENDMENT ACT, S.79 (3)(a).

8. THE IT RULES, RULE 3(3).

or communication to another computer resource" would not amount to hosting, publishing, editing or storing of any information.

It is also clear that Rule 4 of the IT Rules lay out Notice-and-Takedown procedures i.e., mandates that when objectionable content is brought to the knowledge of the intermediary, shall investigate and remove said objectionable information within 36 hours of such notice.

Thus, it has now been clarified that these safe harbor provisions exempt only those ISPs who do not monitor or interfere with internet content, and that it is only in certain situations that the ISP need interfere with internet traffic. The requirement of taking down content which is objectionable is in consonance with the "public harm" requirement, and thus, it is now clear that ISPs in India can follow the norms of internet neutrality without the fear of attracting sanctions.

INTERNATIONAL SCENARIO

There are few countries that have laws regarding net neutrality. Chile was the first country to approve a law that proscribes an ISP from blocking, discriminating or restricting the right of any consumer from using, sending, receiving or offering content. Denmark passed a law recently which prohibits ISPs from charging higher fees, impeding or slowing down applications and websites. It also states that an ISP needs to get consent of the user before placing cookies on their computer, protecting the data of the user.

United States and Net Neutrality

Section 230(b) of the Communications Act of 1934 lays out the national Internet policy of the United States as "to preserve the vibrant and competitive free market that presently exists for the Internet" [9] and to "promote the continued development of the Internet". However, the principles of internet neutrality in the United States have been enumerated by the Federal Communications Commission and are currently enshrined in any enactment.

The FCC enumerated the principles on internet neutrality in its Internet Policy Statement of 2005, which adopted the 4 principles on the topic. The Statement released 4 principles of internet neutrality:[10]

1) That consumers are entitled to access the lawful Internet content of their choice;
2) That customers are entitled to run applications and user services of their choice;
3) That consumers are entitled to connect their choice of legal devices that do not harm the network;
4) That, consumers are entitled to competition among network providers, application and service providers, and content providers.

Pursuant to this policy statement, in 2008, the FCC decided that Comcast Corporation, the ISP provider, had been blocking traffic for Bittorrent, the peer-to-peer sharing network, and that this practice did not constitute reasonable network management. The FCC, in its 3-to-2 decision, also

9. http://www.law.cornell.edu/uscode/text/47/230
10. http://www.publicknowledge.org/pdf/FCC-05-151A1.pdf

ordered Comcast to end this "unreasonable conduct" and also required it to disclose to the Commission and the public the details of the network management practices that it intended to follow within 30 days of the Order. The FCC also adopted these principles in the form of draft rules, proposing to codify them as obligations upon Internet Service Providers.

For a while, it seemed like the federal regulator had managed to usher in an "internet-neutral" era. However, this was not to last – the U.S. Court of Appeal for the District of Columbia in 2010 held that the FCC cannot exercise jurisdiction over network management of ISPs since the FCC has no ancillary authority [11] to bar an ISP from network interference [12] since the exercise of this authority was not seen to be reasonably ancillary to the effective performance of its statutorily mandated responsibilities. In effect, it drew the teeth from the internet neutrality principles enumerated by the FCC and left it with no bite.

In December 2010, after the Court of Appeals decision, the FCC passed a set of internet neutrality rules for the preservation of the open internet. This docket contained 6 principles: [13]

1) Transparency: The right of consumers to know the basic performance characteristics of their Internet access and how their network is being managed;
2) No Blocking: The right to send and receive lawful traffic, including the prohibition of the blocking of lawful content;
3) Level Playing Field : A ban on unreasonable content discrimination and a ban on "pay for priority"/ "fast lane" arrangements;

4) Network Management: An allowance for broadband providers to engage in reasonable network management.
5) Mobile: Broadly applicable rules requiring transparency for mobile broadband providers and prohibiting them from blocking;
6) Vigilance: Creation of an Open Internet Advisory Committee to assist the FCC in monitoring the efficacy of the rules

In spite of the opposition faced by the Open Internet Order, [14] the order was published in the Federal Register in September 2011 [15]. Without a legal challenge and in the absence of any legislation – coupled with White House support for these rules [16] - the latest FCC rules remain the last word on internet neutrality in the US. The recent re-election of President Obama means that the FCC and its mandate of internet neutrality will be looking to receive even more backing in the US in the times to come.

11. The FCC derives such ancillary authority from § 4(i) of the Communications Act, 1934, which authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."
12. http://scholar.google.com/scholar_case?case=12158705661002658248.
13. http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A2.pdf.
14. http://www.nytimes.com/2011/04/09/business/media/09broadband.html .
15. http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf .
16. http://dailycaller.com/2011/11/08/wh-will-veto-legislation-to-overturn-fcc-internet-regulation.

Net Neutrality Legislation in the Netherlands

In May 2012, Netherlands became the first European country, and the second in the world after Chile to pass a binding legislation on internet neutrality. [17] The neutrality provisions were introduced by way of an amendment to the Telecommunications Act, and were made so as to comply with the European Union Directive 2009/136/EC, which mandated the setting up internet neutrality provisions to be adopted by Member States by May 25, 2011. [18]

The Dutch net neutrality legislation is comprehensive, it prohibits ISPs from hindering or slowing down their services, except when necessary. Article 7.4a lists out the 4 circumstances where internet services may be hindered with - to minimize the effects of congestion, whereby equal types of traffic should be treated equally; to preserve the integrity and security of the network; to restrict the transmission to a user of unsolicited communication and to give effect to a legislative provision or court order. [19]

The Act also prohibits the placing of "cookies" or tracking devices, and makes Dutch privacy law applicable to internet usage, requiring the "unambiguous consent" of the user. The Act also prohibits ISPs from using Deep Packet Inspections technologies to inspect internet content except with the consent of the user, who may withdraw said consent at any time[20]. The law requires ISPs to inform customers if and when their details come into the public domain, and also lay down the instances in which the ISP is allowed to disconnect the services of the consumer. These 6 circumstances are termination when asked by the customer, due to non-payment of dues, due to deception, at the expiry of a fixed contract, *force majeure*, or when the ISP is forced to terminate by a court order or an enactment. [21]

The Dutch net neutrality legislation seems to be on solid ground, with one notable exception. The law contains a "religious exceptions clause" – an end user is allowed to request filtration and blockage of internet content on ideological grounds. It is feared that this clause will be used extensively for internet censorship; however, Senator Han Noten of the Labor Party has explained that this clause will be done away by way of a further amendment. [22]

Status in the European Union

In late 2009, European legislators chose not to introduce a legal safeguard to protect Net Neutrality in the "Telecoms Package". This package obliges access providers to inform end-users about traffic management that they implement on their networks and to offer content or application providers access to their

17. http://www.dutchnews.nl/news/archives/2012/05/net_neutrality_anticookie_legi.php
18. http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403143_text
19. https://www.bof.nl/2011/06/27/translations-of-key-dutch-internet-freedom-provisions/
20. http://advocacy.globalvoicesonline.org/2012/05/09/netherlands-net-neutrality/
21. https://www.eff.org/deeplinks/2012/05/netherlands-passes-net-neutrality-legislation
22. http://www.pcworld.com/article/255296/dutch_net_neutrality_to_become_reality_after_senate_approves_law.html

networks at "fair, reasonable and nondiscriminatory conditions" [23] . Moreover, it says that national regulatory authorities shall promote the ability of end users to access and distribute information and run services and applications of their choice. However, in light of the significant body of evidence, the telecoms package has proven insufficient to efficiently safeguard Net Neutrality . [24]

When Vice President Neelie Kroes took office as European Commissioner for the Digital Agenda in 2010, she stated that Net Neutrality would be a central issue on her agenda and launched a first public consultation. However, she moved away from this initial commitment, with one consultation after the other and not much action to ensure a neutral net in Europe.

In 2011, the European Data Protection Supervisor (EDPS), warned that violations of Net Neutrality could have "serious implications" for end-users' fundamental rights to privacy and data protection. The EDPS stated that "certain inspection techniques used by ISPs may indeed be highly privacy-intrusive, especially when they reveal the content of individuals' Internet communications, including emails sent or received, websites visited and files downloaded" . [25]

In May 2012, after a series of consultations, the Body of European Regulators for Electronic Communications (BEREC) published its findings regarding traffic management and other practices that lead to restrictions to an open Internet in Europe. The data from the investigation revealed the increasing trend of providers to restrict access to services and applications.

On 15 October 2012, the European Commission's latest consultation on Net Neutrality officially ended. On a European level, this was the sixth public consultation on Net Neutrality since Neelie Kroes took office. Only two weeks later, the European Parliament demanded the end of the "wait and see" approach and called "on the Commission to propose legislation to ensure Net Neutrality." [26]

A supplementary unofficial consultation was conducted in autumn 2012, when European Member States and the EU institutions were preparing to participate in the World Conference on International Telecommunications 2012 (WCIT12) [27] organised by the International Telecommunication Union (ITU). The goal of the conference was a revision of the International Telecommunication Regulations (ITRs), which is a binding international

23. Directive 2002/19/19 (Access Directive): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML
24. See BEREC study May 2012 http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/ Traffic%20Management%20Investigation%20BEREC_2.pdf
25. EDPS Opinion on Net Neutrality, traffic management and the protection of privacy https:// secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2011/EDPS-2011-10-Net-neutrality_EN.pdf
26. EU Parliament resolution on completing the Digital Single Market, 26 October 2012: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0341&language=EN
27. http://wcitleaks.org/resources/

treaty governing telephone, television and radio networks. The European Telecommunications Network Operators' Association (ETNO) proposed to include global Internet regulation in the ITRs and tabled an amendment that would allow operators to practice differentiated quality of service delivery as well as to establish "sending party pays" business models.[28] This proposal to globally abandon the "end to end" and Net Neutrality principles was not accepted by the European representatives in the process of revision of the ITRs.

EXPERTS VIEWS

The first thing one need to appreciate that net neutrality is extremely complicated and complex issue. It is not an issue which can be solved with the press of a button. Various competing claims need to be taken into consideration. All appropriate discussions with all relevant stakeholders offering all kinds of services in the digital ecosystem need to be examined before proceeding forward.

However, India needs to be cautious of the fact that it should not adopt the cut-and-paste approach. The American experience on net neutrality could indeed provide various learning for the Indian experience. However, the fact still remains that India will need to carve out its own specific way, going forward in the context of the net neutrality.

The conditions in India are dramatically different. India is a Sovereign, Socialist, Secular, and Democratic Republic under the Indian Constitution. India has the second-largest population in the world. India has a constantly growing and evolving Mobile Web where increasing majority of Indian are only accessing the Internet through their mobile devices.

There is no reason for India to be hastening up any kind of action on net neutrality. The government needs to be well-informed of the inputs, views and thought processes of various stakeholders and then take a customized approach depending upon the specific customized requirements of Indian nation and the expected growth of the Indian mobile web. Schemes in violation of net neutrality should not become a handle to derail the Indian mobile web, its growth and to inhibit the unrestricted and unhindered access to the Internet by the common man of India.

India is very different from the US, where there were many users accessing oodles of content and therefore the preferential access of one, squeezed out another. Therefore Comcast would have to squeeze one application out in order to allow the unbridled use of another, ie Netflix. Out of the supposed 200 million plus people on smartphone in India, 90% do not use data. There are only 39 million online shoppers in India, a fraction of the Indian population. All those who use data as a single instance did so for free tunes in the past and Whatsapp messaging in the present. Most internet users in India are on Facebook, Google, WhatsApp, Times Internet and Yahoo. The remainders of the brands are loud but Indians do very

28. ENDitorial: The ETNO's WCIT Proposals are not as bad as some say http://www.edri.org/edrigram/number10.19/wcit-etno-proposals-not-so-bad

little on them. For the internet economy to be somewhat significant, it will have to have at least 40% of the country's population in play, not 10%. The most oft-cited reason why Indians don't pay for data is because they find it too expensive – ie Telcos have not done enough to innovate on data access.

RESULTS OF DEBATE

A. Internet is a global heritage of mankind as a whole. We need the Internet to further contribute to the growth of human mankind in society and not leading to divisions within society.

B. Internet needs to be protected as it is the common paradigm platform that allows creative, innovative approaches of communication, dissemination and transmission of thought processes as also data and information in the electronic form whether in the form of audio, video, image or text.

C. Any initiative on net neutrality should not have impact, to the detriment of the ultimate consumers/netizens of the Internet. Consumer protection issues become critical and most significant in the context of Net neutrality.

D. Initiatives violating Net neutrality should not create an ecosystem of digital haves and have-nots, where the digital haves, by might of their money power can access better quality of services on the Internet at the expense of the digital have-nots, who stand disenfranchised by differential payments for various services and schemes.

E. Today people's lives are dependent on the Internet. People today have a fundamental right to access the Internet. I personally believe that the right to access the Internet is part of the fundamental right to life under Article 21 of the Constitution of India and is sacrosanct in nature and can only be curtailed, in accordance with the procedure established by law. This intrinsically means that any kind of net neutrality has to only come through the legal route in the form of legislation not otherwise.

F. The complicated legal, policy and regulatory issues concerning net neutrality need to be examined in great detail, more so given the fact that the Information Technology Act, 2000 and rules and regulations made thereunder are completely silent on the issue of net neutrality.

G. Net neutrality violative schemes should not become a tool of service providers to legitimately deny or violate online freedom including freedom of speech and expression.

H. Net Neutrality, if not handled properly, could prejudicially impact the Digital India Programme of the Indian Government.

I. We need to be consciously careful that the victories obtained for Internet freedom of speech and expression by the Supreme Court in the Section 66A case should not be given up on the table in net neutrality debates.

J. Net neutrality needs to be understood in the context of the lay user of the Internet in India. Any enhancement of billing for a lay Internet or mobile user is not only going to intrinsically harm the financial interests of the Indian consumer but could also impact the further penetration of Internet apart from prejudicially impacting the confidence and trust that users have in the Internet regulation regime.

ADVANTAGES OF NET NEUTRALITY

- The big telecom companies can provide the ways but don't have any right to direct how the people should walk on them. They cannot differentiate between the different groups.
- Net neutrality has remained a core democratizing tenet of the internet since the time it came into existence.
- Net neutrality protects innovation and if big companies like Google and Netflix could pay to get exceptional treatment, more bandwidth, faster speeds, the new start-up firms would be at a disadvantage.
- It will also negatively affect freedom of speech. In absence of net neutrality, the big companies could give priority to TV networks from videos it owns and slow down the signals from its peers.
- Net neutrality supports competitive marketplace and provides chance to every firm, from big companies to small start-ups to take part in it.
- If net was not neutral, Google, Facebook or Zomato would not have been able to reach where they are today. Curbing netizens right to a neutral net will be a big blow for the budding entrepreneurs.

DISADVANTAGES OF NET NEUTRALITY:

- Times have changed. Today YouTube and Netflix clog the pipes with huge amounts of data. The users download insane amount of software, music and movies illegally. The changes will put a restriction.
- The various companies like Google have created services that allow people to make calls for free on networks that telecom companies have spent billions to build. Net neutrality is injustice to these companies.
- Net neutrality do not protects innovation instead stifles innovation. If the telecom companies can charge higher fees to the prime bandwidth hogs, they can also afford to develop advanced fiber networks that support all forms of new Internet services.
- Some level of prioritization or restriction is essential to support the best interest of consumers as a whole.
- Bandwidth is definitely a limited commodity and regulation will help restrict illegal use of the platform.

POINTS TO SAFEGUARD NET NEUTRALITY

- Accessibility between all endpoints connected to the Internet without any form of restriction must continue to be upheld.
- All forms of discriminatory traffic management, such as blocking or throttling should be prohibited, unless as part of objectively necessary traffic management measures.
- Traffic management should only be allowed as a narrowly targeted deviation from the rule. It must be necessary, proportionate and legally required, or required to address a transient network management problem which cannot be dealt with otherwise.
- Legal clarity must be established to determine what types of traffic management are legitimate under which circumstances.
- Access providers have to indicate in their contracts and advertisements a guaranteed minimum bandwidth, maximum latency and quality measures for

the connection, so that customers can determine whether a particular connection can e.g. be used with Skype. Access providers have to provide tools to verify those standards. These standards must be determined with a statistical method that has to be published.

- We need to establish a clear set of obligations for access providers regarding the neutrality and best effort of the Internet broadband services on the one hand, and for specialised services that are not transported via the Internet on the other.
- End-users should be able to report violations of the points above to an authority defined by the government. This authority must have the necessary resources to enforce the above conditions.
- Indian-wide legislation on Net Neutrality should provide for financial sanctions with a sufficient dissuasive effect.

CONCLUSION

While technology continues to advancement incredibly quickly, many organizations and individuals have been slow to recognise the inherent cyber risk connected to this technology. But the law related to this technology not changed accordingly.

After examining the attempts of other nations to codify internet neutrality as national laws, the question remains – is it desirable – or necessary – for India to enact internet neutrality legislation? At the present moment, India has no such need. It is submitted that India could first tread the path of co-regulation while it concretises its Internet policy – for enacting a net neutrality legislation in a hurry would almost be as bad as ignoring the need for one altogether.

However, the time is not far when a legislation mandating network neutrality would be required in India, for instances of unreasonable traffic interference have been emerging in India with an alarming regularity. For instance, MTS, an ISP, advertised that its internet service Mblaze would provide faster access to sites such as Yahoo India, Wikipedia, Makemytrip, shopping.indiatimes.com and Cricinfo.com, while during the Indian Premier League in 2010, Bharti Airtel, another ISP, promised its subscribers faster internet access to watch the cricket matches via YouTube, a video sharing website owned by Google.

Thus, while drafting legislation for internet neutrality in India, several considerations would be required to be kept in mind. Taking its clues from the Dutch legislation, the Indian legislation should first ban any filtration or blockage of internet traffic by ISPs. Second, a list of exceptions to this ban – included national security – should be enumerated within the Act. Third, the proposed legislation should prohibit “fast lane” or discriminatory treatment for users. Fourth, ISPs should be allowed “reasonable” content management for the purposes of sorting out internet congestion; however, this allowance must be strictly defined. Fifth, ISPs should be forced to disclose their traffic management policies, as well as the prices they will be charging, and their Quality of Service norms to users before they subscribe for any internet service. Sixth, penal provisions, as well as infliction of penalties for the violation of internet neutrality norms within the Act should be specified, for

without strict enforcement norms, such legislation would be rendered useless. Seventh, a separate dispute resolution body, apart from the Telecom Regulatory Authority of India, should be set up, for a body with expert knowledge about the working of the internet would be required for such a legislation to be successful. Lastly, long-arm jurisdiction should be necessarily bestowed upon the adjudicatory bodies under this special legislation, for jurisdictional issues in cyberspace do not correspond to the boundaries drawn to physically delineate nation States.

Although deep thought and consideration would be required to be put for comprehensive, workable, efficacious net neutrality legislation in India.

Finally, there is no simple solution to the Internet Neutrality. Both sides – the proponents and the detractors of net neutrality have valid points, but in the end, arriving at a conclusion in a hurry and making a wrong decision can only hamper the growth of the Internet. The way forward, at least in the Indian context, lies in educating the masses, introducing self-and co-regulatory measures, and arriving at a well thought out legislation in order to adequately deal with net neutrality.

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CRIMINALIZATION OF MARITAL RAPE -A CRYING NEED: Human Rights Perspective

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ABSTRACT

Recent a statement of Mrs. Menka Gandhi, Union Minister of Women and Child Development of India has sent flutter in Indian society and alerted the society to think whether the forced or unwanted sex with own wife should be designated as 'marital rape' and be punished? The matter was raised in the Rajya Sabha (upper house of the Indian Parliament). She acknowledged the happening of incidences of marital rape and stated that government has to collect the vital data of such activity before it is made an offence . [1] The statement and discussion in parliament has given rise to a debate in India. It is to be noted that formerly widely unrecognized by law and society as a crime or unlawful activity, marital rape is presently opposed by many societies around the world, repudiated by international conventions, and increasingly criminalized by evolving various measures. This has been recognized as an issue of violence against women which has attracted the attention of world nations in the latter half of 20th century. Marital rape is very widely experienced and tolerated worldwide for a long time but still it is unrecognized as crime or criminal wrong in a large number of countries.

Key Words : Marital Rape, Violative of Fundamental Rights, Social Justice, Crime or Unlawful Activity,

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INTRODUCTION

There is no universally accepted definition of 'marital rape'[2] . The term marital rape or spousal rape has been defined differently

1. Marital rape: Humble Union Minister if Women and Child Development Mrs. Manteca Gandhi says need data to make it criminal offence'-The Indian Express, April 9, 2016. According to her '"Violence is violence. It has to be strictly dealt with," she said. "We already have a section that covers domestic violence, and if that was used sufficiently for marital rape complaints, there would be grounds to move a new law... (However) police figures show it has not been used even once.' Later on she made a u-turn and stated that concept of marital rape cannot be accepted in Indian context.
2. 'Marital rape' is the sexual intercourse with one's own legally wedded wife or with live-in partner without her consent or against her will-deceitfully or forcefully. 'Marital rape (also known as spousal rape and rape in marriage) is non-consensual sex (i.e., rape) in which the perpetrator is the victim's

by different by statutes and documents. The Prevention of Spousal Violence and the Protection of Victims, 2001 of Japan called it 'spousal violence' and defined it coherently as 'The term "spousal violence" as used in this Act means bodily harm by one spouse (illegal attacks threatening the other's life or body) or the words and deeds of one spouse that cause equivalent psychological or physical harm to the other (hereinafter collectively referred to as "bodily harm" in this paragraph), and shall cover cases where, subsequent to being subjected to violence by one spouse, the other spouse has obtained a divorce or annulment of the marriage but continues to be subjected to violence by his/her former spouse' .[3]

A Human Right Perspective

If we scrutinize the issue deeply, we will arrive on the conclusion that the issue of 'marital rape' relates to gender equality, gender discrimination, gender justice, gender libration and women human rights. It affects the basic freedom of women which is guaranteed by national and international laws. Constitutions of the world nations have conferred on all women right to equality and right to freedom including freedom of sexuality or not to allow any other person, including her husband, to use her body at will- freedom of bodily integrity. The international Convention for the Elimination of Discrimination against Women, 1979, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1883, The Declaration on the Elimination of Violence Against Women of 1993, Beijing Declaration of 1995, the Forced Labor Convention of 1930 these all international documents, with one voice, support the philosophy of gender equality and gender justice and this in turn support the non-consensual or involuntary or unwanted sex even with your legally wedded wife is a type of violence and discriminatory too. The Beijing Declaration of 1995 recognized that 'violence against women, including marital rape, is a manifestation of the historically unequal power relations between men and women'. In the year 2000, In its 23rd session of U.N. General Assembly on 'Women: 2000: gender equality, Development and Peace in 21st Century, Para 69 clause declared that 'Establish legislation and/or strengthen appropriate mechanisms to handle criminal matters relating to all forms of domestic violence, including marital rape and sexual abuse of women and girls, and ensure that such cases are brought to justice swiftly.' The UN Secretary-General's in-depth study on all forms of violence against women stated published in 2006 that-

"Marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 do not exempt marital rape from general rape provisions. Marital rape is not a prosecutable offence in at least 53 States. Four States criminalize marital rape only when the spouses are judicially separated. Four States are considering legislation that would allow marital rape to be prosecuted. [4]"

spouse. It is a form of partner rape, domestic violence and sexual abuse'. Available at https://en.wikipedia.org/wiki/Marital_rape; According to UN Report-Progress of World Women: in pursuit of Justice 'Marital rape, also called spousal rape, is nonconsensual sex where the perpetrator is the victim's spouse', (2011-12) 137.

3. Article 1
4. Ending violence against Women-From words to Action, (2006) 117, UN publication, New York.

Many international declarations also maintain that husband can be convicted for marital rape as every woman have freedom of choice and discard any person from using her body against her will or against her free consent [5]. It has also been pointed out that necessary social, legal and administrative measure must be adopted by national governments to eliminate domestic violence. It has been recognized as violence against women or domestic violence, thus amounting to violation of the human rights of women of right to free choice or freedom of bodily integrity. On a broader perspective, international law has recognized it as violence against women. It has rightly been observed that –

'From a rights-based approach, it is evident that international human rights law and norms provide crucial forms of legal support for the kind of law reform and social change needed to end marital rape. Chief among these reforms must be the criminalization of sexual assault in marriage (and other intimate relationships), as the foundation for a meaningful strategy to end this form of sexual violence in women's lives. The criminality of sex without consent cannot depend on the relational context'.[6]

It has also been observed that due attention has not been paid to this human right issue-

Research has shown that the majority of violence against women is perpetrated by men known to the victims, who can be husbands or common law partners. While domestic violence is acknowledged as a human rights issue warranting legal intervention, the extent of the specifically sexual component of violence against women in intimate relationships, including rape in marriage, is drastically underrecognized. Sexual violence in intimate relationships has received relatively less attention in research literature, in law reform efforts, and in human rights advocacy. It remains a human rights problem without sufficient legal remedies .[7]

Some of the commentators have indicated that absence of legislation on marital rape or non criminalization of marital rape amounts to failure of states or dereliction of States to comply with international human rights obligations. 'State failures to criminalize marital rape represent a violation of women's fundamental human rights, including an undermining of women's right to equal benefit of the law. Moreover, these state failures to criminalize marital rape also represent a dereliction of a state's duties to comply with international obligations to enforce women's legally protected human rights to equality, liberty, and security of the person'. These human rights have been conferred by the above mentioned international documents. Therefore, there is a

5. See- Special Session on "Women: 2000: Gender Equality, Development and Peace for the Twenty-First Century" Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly. 'Sociocultural attitudes which are discriminatory and economic inequalities reinforce women's subordinate place in society. This makes women and girls vulnerable to many forms of violence, such as physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation'. Para 14.
6. Melanie Randall, Vasanthi Venkatesh, '*The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*', Vol. 41 Brooklyn Journal of International Law (2015)152, at 154.
7. Ibid. at 153.

movement world over to criminalize the sexual violence in intimate relationship including marital rape and to take the necessary efforts **to end legal impunities for the sexual violation of women in intimate relationships.** All that is required is to bring social change in the attitude of mankind and consequential legal reforms as has been done in many countries. It is to be noted that at present such sexual violence is less recognized form of violence or legally permitted act resulting into demeaning and humiliating for women of our family or who lives in intimate relationship, like live-in relationship. Now, time is ripe when such sexuality must be recognized as a crime or domestic violence. Because, it causes worst type of physical, psychological and mental cruelty. Voice against marital rape have been raised world over and demands necessary measures to be evolved to deal with such criminal activity with proficient and efficacious administrative and legal measures so immunity of husband (or man living –in relationship.) comes to an end. After that only freedom of choice and bodily integrity will be restored to them in true sense.

The U. N. High Commissioner on Human Rights, in 1993, published a report on *Declaration on Violence against Women*[8] and established marital rape as violation of human rights.

There was a major development when *the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)* – a binding convention was passed in 2011 and became effective on August 1, 2014 [9]. This Convention defined the term '*domestic violence' as 'all acts of physical, sexual, psychological or economic violence that occur with the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.'*

POSITION IN OTHER COUNTRIES

In **England**, husband legal immunity for 'marital rape' was well established and recognized in law till 1992. But with the pronouncement of the judgment in *R v R*[10] by the House of Lords, picture was totally changed, as the House of Lords abolished the immunity of husband from marital rape. It declared that 'in modern times the supposed marital exemption in rape forms no part of the law of England'. It was further clarified that '(T)his is not the creation of a new offence, **it is the removal of a common law fiction** which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it'. Previous to 1992, immunity of husband was based

8. Article 2: (a) *'Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation*'.
9. Till May 2016 about 42 countries of Europe have signed it. See- *http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures*
10. [1992] 1 A.C. 599, House of Lords; in this case husband and wife were living separately. Wife was living with her parents. One day husband came to her and, the defendant forced his way in and attempted to have sexual intercourse with her, in the course of which attempt he assaulted her. He was charge of attempt to rape and criminal assault. He claimed immunity for marital forced sex as wife gives irrevocable consent for sex. But this defense was not upheld and he was indicted for the offences charged with.

on the principle that a wife was deemed to have consented irrevocably to sexual intercourse with her husband and that '"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract'[11] . It was reiterated in first edition of Archbold, 'Pleading and Evidence in Criminal Cases' in 1822. Later on, this plea was doubted to be corrected under all circumstances[12] .

Principle of marital exemption for rape law also prevailed in **U.S.A**. till twentieth century but the decision of the U.S. Supreme Court in *Kirchberg v. Feenstra* [13], put an end to the wife's legal subordination to her husband. The theory that wife is the property of husband and he has unbridled right to use the property according to his wishes was rejected in this case. Now, in most of the states, it has either been abolished the exemption or made it an offence by legislation. In the state of California, this has been designated as 'spousal rape' by passing a law [14]. The law of Tennessee allows for marital rape to be treated like any other type of rape. The South Carolina remains the only US state with a law requiring excessive force/violence (the force or violence used or threat of a 'high and aggravated nature').

Since **Australia** was a common law country, the concept of marital rape exemption was prevailing as it was in England. During 1970 to 1992 the exemption was slowly put an end to. In 1976 by amending the Criminal Law Consolidation Act, 1935, the South Australia declared rape in marriage an offence and extended the definition of rape to include any penetration of the anus of a man or woman without his or her consent. The state of New South Wales became the first state to completely remove the marital exemption in 1981 and in Western Australia, Victoria in 1985 and Tasmania in 1987. The wind of change continued up to 1991, when the High Court of Australia ruled in *R v L*[15] , that the common law exemption for marital rape was no longer a part of Australian law.

In **Japan**, spousal violence which includes marital rape has been recognized as human rights issue. There was movement in various parts of country and as a result of which an Act was passed at national level known as the Prevention of Spouse Violence and Protection of Victims, 2001. In its preamble, it has been declared that it is a 'through efforts towards the protection of human rights and the realization of real equality between and men... even though spousal violence constitutes a serious violation of human rights, as well as being a crime'. Article 1 of the Act has

11. Sir Matthew Hale, History of the Pleas of the Crown (1736), vol. 1, ch. 58, p. 629;See also Blackstone, William. Commentaries on the Laws of England. http://www.mdx.ac.uk/WWW/STUDY/xBlack.htm .This proposition was found good in Reg. v. Miller, [1954] 2 Q.B. 282 But in Reg. v. C. (Rape: Marital Exemption), [1991] 1 All E.R. 755 the court did not find this proposition valid as it did develop many exceptions.
12. In the case Reg. v. Clarence, (1888) 22 Q.B.D. 23, there was no unanimity among the judges of a full court on the effect of Hale's proposition.
13. , 450 U.S. 455 (1981)
14. http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=261-269;
15. [1991] HCA 48; (1991) 174 CLR 379 (3 December 1991)
16. Decided in 2002

defined the term 'spousal violence' very widely which includes physical, physiological by word or deeds. The definition provided is as follows-

The term "spousal violence" as used in this Act means bodily harm by one spouse (illegal attacks threatening the other's life or body; the same shall apply hereinafter) or the words and deeds of one spouse that cause equivalent psychological or physical harm to the other (hereinafter collectively referred to as "bodily harm" in this paragraph), and shall cover cases where, subsequent to being subjected to violence by one spouse, the other spouse has obtained a divorce or annulment of the marriage but continues to be subjected to violence by his/her former spouse.

This Act has given the responsibility to prevent and protect from spousal violence to national government and local entities.

In **Nepal**, the Supreme Court in *Meera Dhungana on behalf of FWLD v HMG, Ministry of Law and Justice*[16] declared that "Sexual intercourse in conjugal life is a normal course of behaviour, which must be based on consent. No religion may ever take it [marital rape] as lawful because the aim of a good religion is not to hate or cause loss to anyone.' The court also directed the Parliament to pass a law on the subject and consequently the Parliament passed the law in 2006 criminalizing marital rape.

Following chart discloses that many other countries have also criminalized marital rape.

	Name of the Country	Year of recognition of marital rape	Name of the Case/Statute
1	Germany	1997	German Criminal Law
2	France	1990	the Court of Cassation
3	Portugal	1982	1982 Penal Code (art. 163° and 164°)
4	Italy	1976	Sentenza n. 12857 del 1976
5	Thailand	2007	Thailand Criminal Law
6	Cyprus	1994	Prevention and Protection of Victims)Law,1994(L.47(I)/1994)
7	South Africa	1993	The Prevention of Family Violence Act,1993
8	South Korea	2013	Supreme Court Judgment on May 15,2013
9	Canada	1983	Bill C-127 (1983) Criminal Code
10	Greece	2006	Law 3500/2006,
11	Nepal	2006	the Domestic Violence Act 2009.And *Forum for Women, Law and Development* vs. *His Majesty's Government/Nepal*, (2002) Supreme Court
12	Malaysia	2006	The Penal Code of 1997- Section 375-A
13	Turkey	2005	Turkish Penal Code, 2005
14	Mauritius	2007	
15	Argentina	2012	The Criminal Code-Article 132
16	Soviet Russia	1922	the Soviet law code of 1922

17. E.g. Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Barbados, Belgium,

Besides above mentioned countries, there are a large number of countries who have, directly or indirectly, declared 'marital or spousal rape' as offence[17] .

Such States have either passed law to this effect or their courts have declared it an offence. On the other hand, there are many countries that have not declared it an offence and applies exemption clause as Prime Minister of Maldives called 'un-Islamic'[18] .

Indian Position

Recently the head of UN Development-Helen Clark observed that 'India could be violating the U.N.'s development agenda if it fails to criminalize marital rape' [19]. She further clarified that only parameter/determining factor is the free consent of the spouse (wife) which will decide the nature of the conduct of husband. It must be seen in the light of the goals and objects of the *Millennium Development Goals of* 2000 and sustainable developmental goals. The statement came in response to the statement made by Indian Union Minister of Women and Child Development Mrs. Menka Gandhi that marital rape is not applicable in India [20] . This statement was criticized world over. According to the *Progress of World's Women: in Pursuit of Justice* (2011) published by U.N.O., '125 countries outlaw domestic violence including marital or spousal rape, but 127 countries do not explicitly criminalize rape within marriage'. India is one of those countries.

It has explicitly recognized that marital spousal rape is a type of domestic violence and violation of women's human right. Before 1085, instances of marital rape not reported or brought to legal institutions, but with the awareness of legal-human rights women, in India do not hesitate to report such cases to public legal institutions. Various news papers and other literature have reported such incidences on many occasions.

The Indian Penal Code of 1856 did not mention or talk about marital rape but proviso of section 376, which defines 'rape', states that marital intercourse with one's own wife will not be rape if she is above 15 years. According to National Crime Record Bureau Report of 2014, most sexual violence in India occurs in marriage; 10% of married women report sexual violence from husbands. Adolescent girls also account for 24% of rape cases in the country, although they represent only 9% of

Belize, Bhutan, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Germany, Greece, Grenada, Guatemala, Guinea-Bissau, Honduras, Hong Kong, Hungary, Ireland, Israel, Macedonia, Malaysia, Mexico, Namibia, Nepal, The Netherlands, New Zealand, Norway, Pakistan, The Philippines, Poland, Peru, Republic of the Congo, South Africa, Spain, Sri Lanka, Sweden, Taiwan, Trinidad and Tobago, United Kingdom, United States, Uzbekistan, Zimbabwe. Source- U.S. State Department 2008 Country Reports on Human Rights Practices; Rwanda, s. Korea, Jamaica, Cuba, Cambodia, Papua New Guinea, New Zealand,

18. *http://www.huffingtonpost.com/entry/marital-rape-bill-maldives_n_4611006.html?section=india* (Jan. 25,2014, The Huffington Post)
19. http://time.com/4257221/india-marital-rape-undp-helen-clark/ (March 14,2016)
20. 'Concept of marital rape can't be applied in Indian context': Menka Gandhi, The Indian Express, March 11,2016; available at http://indianexpress.com/article/business/budget/imarital-rape-concept-maneka-gandhi-indian-context/
21. www.thelancet.com Vol. 383 March 8, 2014,865

the total female population. An estimated 2•5 million adolescent girls (aged 15–19 years) are victims of sexual violence in India [21] . Adolescent wives are most vulnerable, reporting the highest rates of marital sexual violence of any age group [22] .

Therefore, there is a growing demand in India to declare forced or sex without consent as offence of marital rape. The Law Commission of India in its 42nd report (1971) stated the necessity of excluding marital rape from the ambit of Section 375 and the commission was of the opinion that new proposed definition of rape will include it. Though, the Law Commission of India, in its 172nd Report, has stated that by declaring marital rape an offence would amount to 'interference with the marital relationship' [23] . But it also stated that forced sexual intercourse by husband with wife must be treated as rape in other cases [24]. The Government has recently given statement in the Parliament that 'the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors e.g. level of education/ illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc. [25] '. It is further argued that with the introduction of marital rape as an offence will loosen the bond of affinity and a blow to the sacred institution of family.

The Supreme Court of India also refused to criminalize marital rape and declare it an offence [26] . It also refused to accept the Report of **Hon'ble Justice J.S. Verma Committee** (Jan. 2013) (the Verma committee) favoured the criminalization of marital rape. The Verma committee recommended that the exception to marital rape should be removed and it must be treated as sexual assault and punishable as marital rape. It further clarified that the 'marital relationship does not constitute a valid defense against crimes of sexual violence, nor is it to be treated as a mitigating factor justifying lower sentences, and that the relationship between the accused and the complainant ought not to be relevant to the question of consent to the sexual activity'. Consent cannot be presumed in existing marital relationship and consent for sex may be expressed directly or indirectly. But the Government ignored the Justice J.S. Verma Committee Report on marital rape and pleaded

22. International Institute for Population Sciences (IIPS) and Macro International. National Family Health Survey (NFHS-3) India. *http:// www.rchiips.org/nfh s/nfh s3_national_report. Shtml (accessed Feb 17, 2014).*
23. Report was submitted in 2000; similarly the 167th report on the Criminal Law (Amendment) Bill, presented in 2012 in the Rajya Sabha on March 1, 2013 was against criminalizing marital rape.
24. 'Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted'. Law commission of India's 172nd Report
25. Minister of state for home, Haribhai Parathibhai Chaudhary, Marriage sacred, concept of marital rape cannot be applied in India, govt says, Times of India, April 29, 2016,available at *http://timesofindia.indiatimes.com/india/Marriage-sacred-concept-of-marital-rape-cannot-be-applied-in-India-govt-says/articleshow/47098815.cms*
26. 'SC rejects plea to make marital rape a criminal offence', Hindustan Times, February 18, 2015; available at-*http://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html*
27. 167th report on the Criminal Law (Amendment) Bill, 2013 presented in the Rajya Sabha on March 1, 2013 was against criminalizing marital rape.

that 'if marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice' [27] . Now, this issue has been taken up by the Law Commission of India for consideration in October 2013 and it has yet to submit the report on this issue.

The Supreme Court of India has also adopted conservative view and declared on many occasions that eliminating the exemption of marital would affect the institution of family adversely and will create problems in family bonds [28] . Further, treating marital rape as a criminal offence would not be suitable for India at present. On the hand, the court declared a in a case that if wife refuses sex without any reason, this would amount to mental cruelty [29].

Why it should be an offence

Introduction of **the Protection of Women from as Domestic Violence Act in 2005** was a path breaking development in this area. This Act indirectly recognized 'marital rape' as domestic violence, which includes (a) physical abuse, (b) sexual abuse, (c) verbal and emotional abuse, (d) economic abuse [30] . Further, sexual abuse has been defined as '(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.' Thus accordingly marital or spousal rape is a kind of sexual abuse under this Act as it also falls under the category of forced or nonconsensual sex. Moreover, these clauses are also applicable on the rights of women living in live-in relationship. Thus, it is a very wide definition covering all type of abuses, even psychological abuse.

It must not be forgotten that various international instruments have declared it as violence against women and flagrant violation of human rights. The above mentioned domestic violence Act of 2005 has also stated in its 'statement of object and reasons' that –

'Domestic violence is undoubtedly a human right issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in

28. 'Supreme Court refuses to categorize Marital Rape as Criminal Offence' available at http://news.vakilno1.com/supreme-court-refuses-categorize-marital-rape-criminal-offence-12870.html (August 15, 2015)
29. Denial of sex by spouse is cruelty: Supreme Court, The Times of India, Sept, 24, 2014, available at-http://timesofindia.indiatimes.com/india/Denial-of-sex-by-spouse-is-cruelty-Supreme-Court/articleshow/43470243.cms
30. Section 3.- .-For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical,oftheaggrievedpersonortendstodosoan dincludescausingphysicalabuse,sexual abuse, verbal and emotional abuse and economic abuse; or(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security ;or(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b);or(d) Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.
31. Anger over Minister's marital rape comment, The Hindu, May 1, 2015,; available at-http://www.thehindu.com/news/national/anger-over-ministers-marital-rape-comment/article7157945.ece

its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family'.

On the hand, it (marital/spousal rape) has also been found **violative of fundamental rights** conferred under Articles 14, 15, 21of the Constitution of India which also provides protection from domestic violence including marital or spousal rape. This phenomenon of domestic violence is widely prevalent in the Indian society, but complaint by wife has seldom been made. Therefore, it is largely invisible in public domain. It is very rare, in Indian society that wife complains against her husband for such activity as it uncovers husband-wife bed room affairs. Usually, Wife is always supposed to protect and cover the misdeeds and misconducts of her husband from public. But with the march of time thinking and philosophy of the society is also changing and there is a strong voice to change the law and declare marital rape an offence. Justice Verma also observed that exemption from marital rape must be done away with as the exemption 'stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands' and that marriage or marriage like relationship is not a valid defense in such cases.

Similarly, **concept of 'implied and irrevocable' consent of wife for sex is also an archive notion** when the international community is talking about human rights of women and equality of status to them. It is also crucial to note that India has highest number of early or child marriages and sexual inter course occurs in child marriages. Many scholars, eminent social scientist, political leaders, academicians, lawyers, women's rights activists and others are of the view that marital rape must be declared an offence by the government at the earliest [31]. And it should be considered and seen as a part of human right jurisprudence.

In *State of Maharashtra v Madhukar Narayan Mandikar* [32] , The Supreme Court, has referred to the right of privacy over one's body. In this case it was decided that a prostitute had the right to refuse sexual intercourse. There, wives stand in a better position and right to bodily integrity and the right of privacy over their bodies which envisage wife's right to withhold consent and refuse sexual intercourse. Similarly, in *Saretha v T. Venkata Subbaih* [33], the Court observed , 'There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person.' It was declared that by issuing the decree of conjugal rights under section 9 of *the Hindu Marriage Act*, 1955, a wife cannot be compelled to live under same roof and consummate with her husband.

We must also not forget the **psychological aspect** of the problem as it not only men-

32. AIR 1991 SC 207
33. AIR 1983 AP 356, Per Justice P. K. Choudhary, 'The consequences of the enforcement of such a decree (of conjugal rights) are firstly to transfer the choice to have or not to have marital intercourse to the State from the concerned individual and secondly, to surrender the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the State.'.

tally torment a women but she is victim of humiliation, shame, disgrace, indignity and it robes a women of her self esteem. It becomes matter of gross insolence for the victim to go around in the society and many cases it ultimately results in disruption of marital relationship. Physical forceful violation of body of women is demeaning for her. Such act of a person must be punishable which in turn provides women a respectable place and restore their self esteem. Everyday married woman experiences the trauma of marital rape as she cannot run away anywhere from marital home and is compelled to live with her domestic rapist every day. So it is not one time incident but continuing state of affair. Besides this all we must not lose sight of the fact that this is closely connected with human right to privacy and physical autonomy. Right to privacy- a corollary to tight to dignity, is much more important than any other right of a women. It gains more importance looking our Indian culture, social and moral values preserved in Indian society from times immemorial.

Therefore, time is ripe when Indian Parliament must understand the **demand of society and international environment** to eliminate the exemption of marital rape and declare marital or spousal rape as punishable act. Thus, such action would refurbish the concept of individuals' bodily integrity, human dignity, women human rights, women's right to choice, parity of status as envisaged and stipulated by the Constitution of India and international documents. Such law would create a safe environment and eradicate violence against women and thus India will fulfill international obligation too. It has rightly been stated that

'*Criminalizing spousal sexual assault repudiates viewing women as men's property within marriage, and rejects traditional, patriarchal social norms conferring upon men unmitigated rights of sexual access to women who are their spouses. Criminalizing marital rape is predicated on principles of equality and significantly moves towards establishing social norms of gender equality, consent, autonomy and sexual personhood for women'.*

Total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized [34].

What we require today is radical change in the attitude of society. Women should not be treated like chattel but as an independent human being with rights of bodily in-viobility, human dignity, right to choice for sexuality, equality of status as has already been conferred by the Indian Constitution.

Let us act today, tomorrow may be too late.

34. See D. RUSSELL, RAPE IN MARRIAGE, (1982), at 358 (he stated that charging a husband with rape is a symbol of a woman's right to decide if, when, how, and with whom she will have sexual relations).

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HUMAN RIGHTS AND ROLE OF EDUCATION IN INDIA

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ABSTRACT

The exploitation of the certain people of certain class in social system can be seen easily from the history of early stage of the human civilization. It can be traced out in the roots of origin of the private property in the form of the workshop of the patriarchal master in the beginning and formation of family. Violation of human right may be subjected to violation of fundamental natural human rights, forceful labor, bonded labor, fraud or for the purpose of sexual exploitation of the human. The victims of human right violation are young children, teenagers, men and women, anyone who can be used as a means of production. The Present paper is an effort to address and highlight the views and expressions of the person standing at the common place and its possible future direction. An effort has also been made analyze the preventive measures and their consequences with reference to Indian perspective.

KeyWords: Fundamental Natural Human Rights, Forceful Labor, Bonded Labor, Fraud.

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INTRODUCTION

The Constitution of India contains the right to freedom, given in articles 19, 20, 21 and 22 with the view of guaranteeing individual rights that were considered vital by the its framers. The right to freedom in Article 19 guarantees six freedoms. Articles 21A, on 1st April 2010, India also joined a group of few countries in the world, with a historic law making education a fundamental right of every child, were came into existence. It makes elementary education an entitlement for children in the age group 6-14. The labor power is required to produce any sellable commodity, or in other words it is the necessary input for the conversion of raw material to commodity. The commodities are the commercial product being manufacture and prepared

not for the purpose of human use, but for the purpose of selling or buying and thus for the sake of profit. This selling and buying depends upon the basic phenomenon of profit. Labor is one of the important entities of the commodity production long with the raw material and other supportive devices. Profit can be increased if cost of any one or all the entities decreased. It is the target which is being looked at by the economist of all the period. They have found the poor people, uneducated, unemployed, living in extreme poverty conditions and living in scarcity and are easily achievable neck for the cheapest means of production. The fundamental right of any human being consists mainly the natural and the facilities those provided by the nature to all human being without any kind of discrimination. As when any person feels that he or she is being not allowed to enjoy natural freedom then the question of fundamental human right comes in to the picture. There are several ways to describe these right and hence varies from place to place and person to person. In the present time human right has become a crucial issue for the policy makers and sociologists specifically after the decade of ninety

Fundamental Human Right

All people, irrespective of race, religion, caste or sex, have been awarded the right to seek the help of Supreme Court and the High Courts in the states for the protection and enforcement of their fundamental rights through the legal framework. Poor people may not have the means to do so and therefore, in the public interest, anyone can commence litigation in the court on their behalf. This is known as 'PIL' Public interest litigation. In some cases, High Court judges have acted on their own on the basis of newspaper reports. In its early years, PIL was a process which provides. :

- Recognized rights and their denial in the public domain. Prisoners, for instance, hidden amidst high walls which confined them, found a space to speak the language of fundamental and human rights.
- Led to juristic activism, which expanded the territory of rights of persons. The fundamental rights were elaborated to find within them the right of dignity, livelihood, clean environment, health, education, safety at the workplace. The potential for reading a range of rights into the fundamental rights was explored.

It is regretting that India who was once looked up by whole world as the pioneer of these values is now groveling in lowly dust of atrocities and human rights abuse. Human rights abuse is sadly a reality in India society. Now, there is The Need for Human rights and role of Education in India. It has a crucial role in preventing human rights violations from occurring.

The United Nations proclaimed that human rights and role of educations "training, dissemination and information efforts aimed at the building of a universal culture of human rights through imparting knowledge and skills and the molding of attitudes." These efforts are designed to strengthen respect for human rights and fundaments freedoms, facilitate the full development of human personality, sense of dignity, promote understanding, respect, gender equality and friendship to

enable all persons to participate effectively in a free society, and further activities for maintenance of peace.

Human rights and role of education, training and public information are, therefore, necessary and essential for the promotion and achievement of stable and harmonious relations among the communities and for fostering mutual understanding, tolerance and peace. Through the learning of human rights as a way of life, fundamental change could be brought about to eliminate poverty, ignorance, prejudices, and discrimination based on sex, caste, religion, and disability and other status amongst the people.

In India is the personification of human rights is also the basic essence of all religions, Love, compassion, loving kindness are the same. However, while teaching religions we confined the obligations arising from these doctrines only to their followers. Human rights could bring in a universal aspect to moral and ethical education and we in our divided societies are in great need of this. On the other hand in the context of rapid secularization we could still retain a basic common ground for respect for each other.

Indian textbooks barely mention human rights. Indirect references to human rights are included in the Directive Principles of the Constitution of India and in civics and history textbooks. Most universities in India do not offer human rights education, although some have three-month to one-year postgraduate courses on human rights. Section 12(h) of the Protection of Human Rights Act, 1993, requires the Commission "to spread human rights literacy among various sections of society and promote awareness.

Education is a tool for elimination of human rights violations without education we cannot see beyond ourselves and our narrow surroundings to the reality of global inter dependence. There is an effective need to be contextualized too. Thus it is not enough to teach abstract principles of human rights taken from United Nations' documents or our Constitutions but the urgent need for the establishment of a national level institution for studies, tanning, research, publication, conferences, organization and consultancy in the field of human rights and civil liberties. The India Institute of Human Research was established as a constituent unit of the world Institution Building Programme (WIBP) an international charity incorporated in March, 1990 as a public charitable trust at New Delhi. Indian institute of human rights advising by WIBP to get the co-sponsorship of different universities for launching need based progammes at bachelor's, master's as well as Doctoral levels.

CONCLUSION

The impact of numerous changes in the world today on human rights has been both negative and positive. In particular, the risks posed by advancements in science and technology may several hold back the implementation of human rights if not handled carefully.

In an interdependent global economy, our own prosperity and security can best be guaranteed by tolerant, stable, democratic, societies in the regions where we travel and trade. Human rights violations in one country are the concern of other states. So broadly we can say only healthy

and sensitive education can change the scenario.

It appears that majority of Indian masses are in favour of higher judiciary and its judicial activism because the masses feel that there rights are being protected and promoted by the judiciary. The higher judiciary is in reality working as the guardian of Human Rights in India.

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THE RIGHT TO SELF-GENERATE ELECTRICITY BY SOLAR PV

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ABSTRACT

In today's era, where apartments have taken over the concept of individual houses, Property owners are being deprived of their fundamental right to generate electricity for their personal use. The societies are providing the apartments to the individual owners but rooftop and ground are treated as common area and thus installation of solar photovoltaic (PV) electric generating systems for individual owners are being denied. Besides that, in those areas of the country where competitive retail access to electric-service does not exist, two powerful entities are engaged in a struggle to determine who has the right to supply all or a portion of the electric energy services necessary to meet a consumer's needs. On one side are the traditional monopoly retail distribution utilities that have provided such services for over 100 years. On the other side are consumers themselves and independent third-party providers of distributed generation and storage systems who supply those consumers with the means to generate their own power. The struggle may involve efforts by utilities to preclude third-party providers from selling to individual consumers, or to ensure that neighbours cannot work together to meet their common electricity needs. It can involve efforts to discourage self-generation by imposing steep customer charges on the bills of solar customers, or the insistence that the full output of a customer-sited generating system be fed into the grid, rather than used onsite. If there is a right to self-generate, then such tactics impinge on that right to a greater or lesser extent. This paper examines the legal issues behind this struggle and the relative rights of consumers to self-generate while continuing to be interconnected to a utility distribution system grid.

KeyWords: Solar Photovoltaic (PV) , Fundamental Right To Self-Generate Electricity, Legal Right To Self-Generation, Rationalize Energy Policy.

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INTRODUCTION

Property owners in India have the right to generate electricity onsite, for their own use. This understanding is so fundamental that legislatures have not bothered to spell it out.But the right does exist in the law, and it derives both from common law principles concerning the beneficial use of property and from federal and state laws that imply that property owners can

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self-generate through encouragement, protection, or facilitation of such activity.

As the cost of onsite solar photovoltaic (PV) electric generating systems has plummeted and deployment of residential and commercial systems has accelerated, thus decreasing revenue for state-sanctioned electric distribution utilities, there has been increased pressure to constrain onsite, grid-connected generation. Thus the right to self-generate is becoming increasingly important as this tension between consumers' access to distributed generation and distribution utilities aversion to increased levels of customer owned generation increases. State and local governments may have full authority to impose reasonable conditions on grid-connected generation when necessary to protect public health and safety. However, such authority does not justify either prohibiting these installations, or unreasonably restricting the customer's ability to use the electricity generated by those systems to fully offset energy requirements on one's own property. We will describe the legal and historical context for a right to grid-connected self-generation and consider the benefits of making that right more explicit.

EVOLUTION

In the early dawn of the evolution of our species a new and useful tool to provide us with an array of services was discovered—fire. Soon we learned to tame it and control it for our collective tribal purposes. Once a source of fire was found, someone would then transport the smoldering remnants of that original source to the tribal encampment. There, its energy would be used for multiple beneficial purposes including heating, light, cooking, defense from wild animals, and tool making. The tribe did not need or want the "fire" per se, but instead the services that it could provide.

In order to oversee and maintain this community source of energy, the role of fire-keeper was created. This person or group was tasked with obtaining the means to create fire for the tribe near its home camp, and maintaining the fire once ignited at the community hearth. Fire-keepers were the central, reliable source of this critical element for the tribe's security and well-being.

Gradually, methods were devised to create fire locally, without the need for transportation of coals or embers from long distances. Flint could be struck against iron to produce sparks, bow drills created friction and heat to ignite tinder, and once glass was produced, lenses could be used to focus the sun to start a fire. The wide availability of the skills and materials need to start a fire lessened the importance of the ancient role of fire-keeper.

Finally, with the advent of the first self-igniting chemical match in 1805, the energy of fire could be easily available to anyone in their home or business, or wherever they chose. The ability and right to use this source of energy was no longer limited to those with the power to create it and distribute it.

No one would suggest that an individual lacks the legal right to start and maintain a fire in their own house in a stove for cooking or in a fireplace for heating and aesthetic enjoyment. Further, it is commonly understood that property owners can use fire on their premises for any purpose that

conforms to applicable laws, regulations, and codes regarding health and safety.

Fire is one way to harness energy for useful purposes. Electricity is another. Unlike fire though, the harnessing and delivery of this useful societal tool eluded us until the mid-eighteenth century. It was then that the mechanism for electrical generation and the invention of end-use applications, such as electric lighting, were developed and commercialized. To economically generate, deliver, and use this new energy source, a system of centrally located electric generation stations was built, primarily fueled by coal or the current of rivers. Later, oil, gas, and nuclear fuel were added to the mix. From those central electric generating plants, transmission lines conducted power toward a place of demand where voltage was eventually stepped down again to the level used in our homes and businesses.

Electricity, as commonly delivered today, could be considered analogous to the coals transported by our ancestors, from encampment to encampment, to provide energy to all members of the tribe. And there is still a "fire-keeper" for electricity—the retail distribution utility—charged with the responsibility to reliably protect the "fire source" and provide it to all members of the community. It delivers electricity to us, and owns and maintains the means to do so. The local electric distribution utility is typically given the governmental imprimatur of a "monopoly franchise." This exclusive right to a monopoly franchise or service territory carries with it an obligation to invest in and reliably provide electric service to all customers within the service territory. Unlike the case of the fire-keeper, these obligations on the part of the utility also include the right for the utility to charge and receive from its customers full compensation (expenses, including investment, plus a regulatory determined return or profit level) through a rate tariff or series of tariffs established and authorized by the state utility regulator. However, this right is limited by the requirement that the monopoly utility provides service at the "lowest feasible cost," and takes advantage of "allavailable cost savings opportunities."This bundle of rights, obligations, andcompensation is referred to as the "regulatory compact" or cost-of-service rate regulation.

Just as the invention of the match democratized access to fire in 1805, today's consumers are seeing technological and economic advances which increasingly enable them to enjoy the energy services provided by electricity independent of a "fire keeper."Consumers now have access to many diverse and increasingly cost-effective means to produce electricity on their own property to meet their own needs, including micro turbines, fuel cells, gas and diesel generators, and one of the fastest growing sources of distributed electric production—solar PV systems. That access and the rapid spread of the deployment of solar PV systems is challenging the traditional notions of a utility franchise to the extent that some utilities are questioning the ongoing viability of the traditional utility business model, pushing back with proposals for fees on customers who chose to "go solar".

Thus legally establishing the right to self-generate, in the face of such utility opposition, is becoming an increasingly important question and potentially a tool for consumers to use to stave off

utility challenges to the use of distributed generation. This question increases in importance because, especially as to residential rooftop solar, there is an ever-increasing effort on the part of retail electric distribution utilities to throw up an array of barriers to continued deployment of those residential solar systems. Such barriers take the form of interconnection delays, connection fees, monthly demand fees, monthly fixed charges, and other "creative" ratemaking proposals. Two of the most egregious examples of local utilities instituting practices to discourage consumer self-generation are: (1) the average interconnection times for Potomac Electric Power Company in Maryland to connect a residential solar system—seventy-six days compared to the national average of twenty five days, and (2) Salt River Project unilaterally instituting a demand charge on new residential solar customer increasing the average new solar customer's bill by fifty dollars per month.

Although these geographically disparate examples are extreme, they represent the breadth of the current utility effort against consumer self-generation. The availability and reliability of fire became distributed and local. So soon will be the availability and reliability of electricity service.

This is not to suggest that we do away with the retail distribution utility.It is only to frame the legal question to be investigated by this paper: Does an individual have the legal right to self-generate electricity on his own property for production of energy services for his own use while still being connected to the local electric distribution utility system? We explore that question in the sections that follow. We would also make clear, however, that this paper will not address the issue of selling or disposing of excess energy produced from a consumer's distributed system or the correct pricing of that excess energy. That issue, often referred to by the term "net energy metering," requires a complex analysis of the value of distributed generation that is more of an engineering and economic analysis than a legal question. Those questions are beyond the scope of this investigation.

COMMON LAW PROPERTY PRINCIPLES SUPPORT A LEGAL RIGHT TO SELF-GENERATE

Common law property principles support the view that a property owner has a legal right to generate his own electricity because doing so falls within the owner's right to use and enjoy his property. The term "property" encompasses more than a physical thing and is frequently described as a collection of substantive rights, privileges, powers, and immunities.At the core of this bundle of rights are three key expectations: (1) the right to possess to the exclusion of others, (2) the right to use and enjoy, and (3) the right to dispose.

The right to the use and enjoyment of one's property has continued to be an essential characteristic of property law, informing numerous areas of property law such as laws on covenants and zoning. Courts have consistently described the right to property as encompassing a corresponding right resembling liberty, namely the free use of property.The resulting law of property disfavors arbitrary and/or frivolous use restrictions.In the case of zoning laws, restrictions must be necessary

for the prevention of harm to other properties or for the promotion ofthe general welfare, and they must be "'reasonable,' and impartial in treatment."Moreover, many courts construe these laws narrowly in favor of property owners and the free use of land, finding these restrictions to be "in derogation of the common law and deprive the property owner of uses to which the owner would otherwise be entitled."Similarly, courts have found that restrictive covenant laws infringe upon the right to property, and thus, courts will not extend their application beyond their expressed terms and resolve conflicts "in favor of the free use of land."

While these principles, which have been carried forward to current times, support the notion that a private use such as self-generation is within the appropriate discretion of the property owner, the right to use and enjoy property is not unlimited. In common law, property owners had a broad right to make reasonable use of their property, provided that such use does not endanger public health or otherwise create a public nuisance.On the one hand, use and enjoyment is a principle of autonomy; a property owner's expectation includes the right to use and enjoy one's property as they please without disturbance.Thus,a property owner has the right to manage his electricity load through actions such as installing and running various kinds of equipment: solar panels, small wind turbines, fuel cells, diesel powered back-up generators to generate electricity, batteries, and other technologies to store electric potential for future use, and energy efficiency measures to conserve electricity usage. On the other hand, he may not make an unreasonable use that injures a neighbor's comparative expectation of use and enjoyment.

Accordingly, courts can and have restricted owners' use of their property to self-supply public services, but only where necessary to safeguard public health.In various states, the courts have upheld legislation preventing individuals from self-supplying water and sewerage services, on the basis that such supply poses significant health risks.The court noted that while it seemed that properly operated private septic tanks could provide a sanitary disposal system, the publicly maintained sewage system of the whole community was "undoubtedly better at doing away with potential as well as actual health menaces."The court explained that "[t]he community is to be considered as a whole in the matter of preservation of the health of all inhabitants, for a failure bya few to conform to sanitary measures may inflict ill health and death upon many."

However, the ability of government to place reasonable restrictions on the use of property in the name of public health and safety does not create limitless authority. For instance, some cases underscore the distinction between requiring property owners to obtain hookups to domestic water supplies and prohibiting use of other water sources. Within the bounds of an individual's constitutional right to privacy, an individual can drink water from any source he chooses, includingwater from a well on his property. An onsite generating source that is to be used in addition to power derived from the grid should receive similar protection. There appears no legal requirement to consume a specified level of electricity from the grid once

interconnected. Nor does there appear to be a requirement to be interconnected to the local electric distribution grid, even if one is available.

Self-generation of electricity does not raise the same health and safety concerns as the self-supply of public services like water and sewerage. Whereas self-supplying these other public services can endanger the health and safety of the entire community, the risk associated with self-generation is to utility repair crews and other emergency workers, who could be injured if distributed generating facilities back-feed power to the electric system during outages—a situation known as "islanding." This risk can be effectively negated by using automatic anti-islanding or disconnect devices which separate the operation of distributed generating facilities from those of the larger electric grid during islanding conditions. So, despite the potential seriousness of the risk, it is relatively isolated and can be easily contained and mitigated. Sewer and water risks are potentially much more pervasive, and mitigation measures need to be widely deployed throughout the delivery or collection system. Self-generation risks can be contained and mitigated at the source and thus isolated relatively inexpensively and without general community intervention.

Furthermore, courts have upheld the self-generation of electricity as a viable use of one's property in the context of nuisance challenges. Some cases have found that electricity-generation that is lawful is not per se a nuisance, and so they engage in a balancing test to determine whether the activity in question was a nuisance on a case-by-case basis. While there are no laws explicitly providing private land owners the rightto self-generate, these cases suggest that the generation of electricity on private property to self-supply public services is within a property owner's right to the use and enjoyment of their land, so long as it is lawful (not in violation of an existing law such as noise ordinances, etc.), or unreasonably interfering with the use and enjoyment of another's land.

CONSTITUTIONAL LAW PROTECTING THE RIGHT TO USE AND ENJOY SUPPORT A LEGAL RIGHT TO SELF-GENERATE

Neither the Constitution nor any state policy expressly establishes a person's right to generate electricity. However, such a right is consistent with the right to use and enjoy one's property. If government regulation interferes with self-generation, a property owner may be able to successfully challenge such interference.

Beyond the protection of health and safety, government only has the authority to regulate the conduct of private activity once it becomes clothed in the public interest.37 Businesses become clothed with a public interest when "the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly." But, "one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public." Furthermore, different types of government regulations may be more or less appro-

priate depending on the extent to which the activity in question is a matter of public interest: the police power to regulate business or to require a license "may be quite distinct from the power to fix prices," since "the latter, ordinarily, does not exist in respect of merely private property or business." Arguably, small-scale self-generation for personal use, or even when excess power is sold back to the grid through net metering sales, wouldnot be an activity clothed with the public interest, and therefore should not be subject to government regulation or at least not rate regulation.

In the alternative, if the extent and scale of self-generated electricity sold to third parties, etc., implicates the public interest, government regulation of rates would still be subject to limitation. While businesses clothed in the public interest are subject to rate regulation prescribed by the state, these rates must be "reasonable." The Takings Clause requires the government to pay just compensation when government regulation imposes such burdens on property that it is a regulatory taking, including those regulations that deny an owner economically viable use of his or her land. In a number of contexts, courts have found unreasonable rates to equate to regulatory takings, requiring just compensation.Determinations of reasonableness can involve consideration of various factors, and ultimately the chosen methods used to determine rates receive deference from courts "so long as the end result is fair . . . ."For example, a fair rate of return for a utility to charge for its own service compared to a fair rate for the excess electricity from a self-generator may be different. Still, the concept of a fair rate of return, considering the fair market value for the price of electricity,should provide a baseline minimum for reasonable rate regulations. However reasonableness is determined, anything less than a reasonable rate will supply a self-generator with a takings cause of action for monetary damages equating to just compensation. This is not to engage in the net metering debate related to the appropriate credit for energy or other energy services delivered to the distribution grid beyond that energy used locally by the consumer. As indicated above, that is an engineering and economic analysis beyond the scope of this paper.

CONCLUSION

There appears to be a fundamental right, in common law, supported by implication in state and federal law, to self-generate electricity on one's own property for one's own use. But that does not mean the legal discussion should end there. Lawmakers and policy makers must continually weigh the benefits stemming from such a fundamental right against the costs that the exercise of a right might impose on society as a whole. The escalating utility legal and policy barriers to net metering for rooftop solar PV systems are putting the right to self-generate to the test. Some state utility commissions are beginning to investigate how to price the excess output from distributed solar. But such an investigation should not eclipse the consumer's fundamental right to self-generate by imposing economic or legal policies that negate the value of that self-generation. An assessment of the costs and benefits of self-generation and the production of excess generation for the grid must be conducted, assessed, and judged in a dispassionate, transparent, and objective manner or the right to be our own "fire

keeper" could be lost without cause.

If regulators are not careful, current efforts by both detractors and supporters to rationalize energy policy for distributed generation with the utility business model could diminish this fundamental right. For example, a value-of-service tariff with a must-sell provision impairs the right to self-generate by making a customer choose between using its own generated power or selling its excess power back into the grid. A prohibition on using power purchase agreements for on-site solar production restricts the right to self-generate by eliminating a potentially cost-effective option for "going solar." A prohibition on behind-the-meter storage could have the same effect, especially in the context of weakened net metering benefits, by preventing the customer from making beneficial use of excess generation. These are but a few examples.

Policy advocates may want to encourage regulators and lawmakers to recognize the right to self-generate explicitly, and use potential impacts on that right as a yardstick for assessing the merits of new policy initiatives. Perhaps this is a right that no longer should be implied, but instead, should be saluted.

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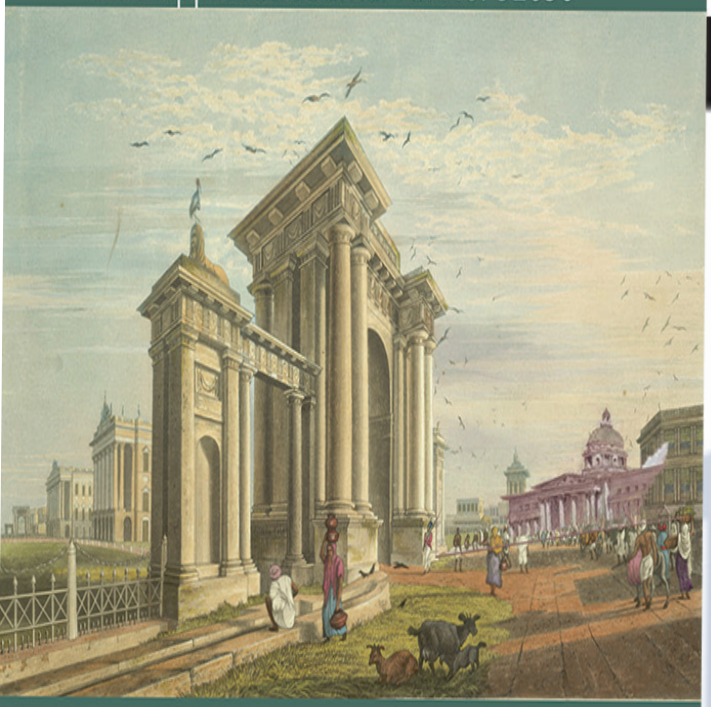

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